134-650

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 176.

HENRY W. KINGSBURY, APPELLANT,

vs.

SIMON B. BUCKNER, JANE C. KINGSBURY, JOHN J. D. KINGSBURY, CORYDON BECKWITH, AND J. HOWARD MANCHESTER, ADMINISTRATOR OF AMBROSE E. BURNSIDE, DECEASED.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 14, 1886.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms, in the city of Chicago, in the district aforesaid, before the Hon. Henry W. Blodgett, district judge of the United States for said northern district of Illinois, on Friday, the nineteenth day of July, in the July term of said court, in the year of our Lord one thousand eight hundred and seventy-eight, and of our Independence the one hundred and third year.

WM. H. BRADLEY, *Clerk.*

HENRY W. KINGSBURY, by His Guardian, JOHN V. LE MOYNE,
vs.
SIMON B. BUCKNER, AMBROSE E. BURNSIDE, CORYDON BECKWITH, and JANE C. KINGSBURY. } In Chancery.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the second day of July, 1877, came the complainant, by his solicitors, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in said district, their [his] bond for costs, and also at the same time filed a transcript of record from the circuit court of Cook county, Illinois, in said above-entitled cause; which said bond and transcript are, respectively, in the words and figures following, to wit:

2 *Bond for Costs.*

UNITED STATES OF AMERICA,
Northern District of Illinois, } *ss:*

Circuit Court. July Term, A. D. 1877.

HENRY W. KINGSBURY, by Guardian & Next Friend,
vs.
SIMON BUCKNER, MARY K. BUCKNER, and Others. } In Chancery.

I enter myself security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action or to any of the officers of this court, and, in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him, hereby agree and stipulate that execution may issue against my property for any costs taxed against him.

Dated this second day of July, A. D. 1877.

HENRY CRAWFORD.

Endorsed: Filed July 2, A. D. 1877. Wm. H. Bradley, clerk.

3 *Transcript of Proceedings from the Circuit Court of Cook County, Illinois.*

UNITED STATES OF AMERICA, } ss:
State of Illinois, Cook County, }

Pleas before the Honorable E. S. Williams, one of the judges of the circuit court of Cook county, at a term thereof begun and held at Chicago, in said county and State, on the third Monday (being the 18th day) of June, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of the United States the 101st.

Present: Honorable E. S. Williams, one of the judges of the circuit court of Cook county, State of Illinois; L. L. Mills, State's attorney; Charles Kern, sheriff.

Attest: JACOB GROSS, *Clerk.*

Be it remembered that heretofore, to wit, on the 11th day of August, A. D. 1873, H. W. Kingsbury, by Henry Crawford, Esq., his attorney, filed in said court his certain bill of complaint in words and figures following, to wit:

STATE OF ILLINOIS, } ss:
Cook County, }

Circuit Court of Cook County.

To the judges of said court, in chancery sitting:

Your orator, Henry W. Kingsbury, an infant of the age of ten years, suing by Eva Lawrence, his guardian and next friend,
4 humbly complaining, exhibits this his bill of complaint against Simon B. Buckner and Mary K. Buckner, his wife; Jane C. Kingsbury, John J. D. Kingsbury, Ambrose E. Burnside, and Corydon Beckwith.

And thereupon your orator showeth unto the court that your orator was born on the 16th day of December, 1862; that his father was Henry W. Kingsbury, who was born at Chicago, Ill., on the 25th day of December, 1836; married to Eva Taylor on the 4th day of December, 1861, and was mortally wounded, while in the service of the United States, at the battle of Antietam, on the 17th day of September, 1862, and that he died on the day last aforesaid; that after the death of his father your orator was born, and that he was the sole issue of such marriage, and as the posthumous child of his father your orator became and still is the sole heir-at-law of all the real estate whereof his said father died dsized [seized] and of all his rights, credits, and effects, subject only to the dower rights of the mother of your orator, and also the dower rights of Jane C. Kingsbury, as is more particularly hereinafter specified.

And your orator further shows unto the court that on the 26th day of September, 1865, the mother of your orator was married to Albert G. Lawrence.

And your orator further shows that his paternal grandfather was Julius J. B. Kingsbury, of the United States Army; that he was born in the year 1797, and was intermarried with Jane C., his wife, in the year 1825; that he died intestate on the 26th day of June, 1856, leaving him surviving his wife, Jane C. Kingsbury, and as his sole heirs-at-law his two children, Henry W. Kingsbury, the father of your orator, and Mary K. Buckner, who had intermarried with the respondent, Simon B. Buckner, in May, 1850, and by whom she had the following issue: Lily Buckner, born March 7,
5 1858, and now living, and Henry Kingsbury Buckner, born February 9, 1861, and deceased in January, 1862.

And your orator further shows that said Julius J. B. Kingsbury, at the time of his decease, was the owner in fee simple, as appears by the records of conveyances of Cook county, Illinois, of the following real estate in Cook county, Illinois:

Lots 5 and 6, in block 35, original town of Chicago, and also a certain tract of land described as follows in a deed dated May 30th, 1833, executed by James Kinzie and wife to the said Julius J. B. Kingsbury and recorded May 31st, 1833, in Book A, page 139, in the records of deeds of Cook county, Illinois, to wit, bounded as follows: From the southeast corner of the town of Wabansia, commencing at the southeast corner of lot 1, in block 1, in said town of Wabansia (James Kinzie's Addition to the town of Chicago), adjoining Kinzie street, in the town of Chicago (as laid off by the commissioners of the Illinois and Michigan canal), at a stake at the said corner of said lot on the southwest bank of the north branch of the Chicago river, at or near the water's edge, continuing at about north seventy-eight — west along the said southwest bank of the said river, varying in distance from the water's edge in proportion to the distance of the east and west lines dividing the lots, blocks, streets, and alleys of blocks 2 and 3, in the said town of Wabansia (with the exception of lot 8, in block 2, which was conveyed by James Kinzie and wife to Seth Johnson, which said lot extended eastwardly into the center of the channel of the north branch of the Chicago river), to the intersection of the west line of the said town of Wabansia; thence north and terminating in the Chicago river; thence from a stake ninety links from the corner from which a poplar bears northeast and a lynn bears south eighty-four degrees six-nineteenths chains and two links to a stake, from which a lynn bears north seventy-eight — thirty — west, and also bears north two — thirty
6 — west; thence twenty-two chains and seventy-five links to a corner established by the commissioners of the Illinois and Michigan Canal; thence four and 46 one-hundredths chains to the Chicago river (north branch); thence three and 45 one-hundredths chains to the place of beginning, the same being one equal half of the remaining part of the east half of the northwest quarter of section nine, in township thirty-nine north, of range fourteen east, after taking therefrom the said town of Wabansia, and which is otherwise described as all the east half of the northwest quarter of section nine, in township thirty-nine north, range fourteen east, of the third principal meridian, east of the southwest bank of the north

branch of the Chicago river and south of an addition to Chicago, formerly known as Sedgwick, and which is commonly known as "the Kingsbury tract," containing about 35 acres, except a strip seventy feet in width, extending along a portion of the river front of said tract, which had been conveyed by said Julius J. B. Kingsbury to Simon B. Buckner on January 22, 1855.

And also two hundred and forty acres of land in Caldwell reservation, in Cook county, Illinois.

That upon certain portions of the said real estate there were encumbrances, as disclosed by the said records of Cook county, Illinois, to the following amount—that is to say, to John B. Tolman in the sum of $5,000, and to Corydon Beckwith, as trustree for Joseph Spencer, in the sum of $8,000, and there were no other liens or incumbrances on the said property except as aforesaid.

That besides the said real estate in Cook county, Illinois, the said Julius J. B. Kingsbury was the owner in fee simple of real estate in Waterbury, Connecticut, of the probable value of $7,000.

And your orator further shows that no administration whatever was ever taken out on the estate of said Julius J. B. Kings-
7 bury, and that the father of your orator was, at the date of the death of said Julius J. B. Kingsbury, a minor of about the age of nineteen, and did not reach his majority until the 25th day of December, 1857.

And no guardian was ever appointed for the estate of the father of your orator during said minority.

And, as your orator is informed and believes and therefore charges, the said Henry W. Kingsbury, deceased, never, from and after the date of his majority aforesaid, joined in any conveyance or in any manner parted with the title to his undivided interest in the parcels of real estate described aforesaid or any part thereof, either in Illinois or Connecticut, nor was there ever any partition of said property or any part thereof among the parties entitled, but he continued to remain the holder and owner of such undivided interest at the time of his death, except the parcel of land sold in April, 1862, to Emily Spencer by said Beckwith as trustee, subject to certain indentures of mortgage, which were executed jointly by said Henry W. Kingsbury and said Buckner and wife and Jane C. Kingsbury, as is more particularly hereinafter set forth, and the $13,000 of encumbrances executed by Julius J. B. Kingsbury in his lifetime as aforesaid.

And your orator further shows unto the court that it appears in and by the records of conveyances of Cook county that on the 22d day of January, 1855, the defendant, Simon B. Buckner, became the owner by a conveyance in fee simple absolute, with full covenants of warranty from Julius J. B. Kingsbury, of the following-described premises in Cook county, Illinois:

A strip seventy feet wide, lying along the north branch of the Chicago river, the length of said previously described Kingsbury tract.

8 And that said Buckner remained the owner of such strip of land, except a reconveyance to said Julius J. B. Kingsbury of seventy by one hundred feet thereof, as appears by the said records,

until May 16, 1861, when he conveyed the said property, his wife joining him therein, to the father of your orator, as is more specifically hereinafter set forth.

And your orator further shows that on the 15th day of May, 1861, at Louisville, in the State of Kentucky, the said defendants signed, sealed, and acknowledged in due form of law a deed of conveyance in the words and figures following:

Be it known that Simon B. Buckner and Mary K. Buckner, his wife, of the city of Louisville and State of Kentucky, in consideration of the sum of one dollar in hand paid and the natural love and affection we bear to our brother, Henry W. Kingsbury, do hereby grant, bargain, sell, and convey to said Henry W. Kingsbury, of the United States Army, his heirs and assigns forever, the following property:

One undivided half of lots number five (5) and six (6), in block number thirty-five, in the original town of Chicago, in the county of Cook, in the State of Illinois, and also all our right, title, and interest in the "Kingsbury tract," so called, being the tract of thirty-five acres, more or less, purchased from James Kinzie by the late Major Julius J. B. Kingsbury, of the United States Army, as per deed of said Kinzie on record in the clerk's office of Cook county, Illinois, the said tract being the south half of what remained of the northwest quarter section nine, in township thirty-nine, range 14, in said Cook county, after deducting therefrom the town of Wabansia. The other interest in said land and tenement, etc., included in this deed now belongs to said Henry W. Kingsbury as one of the
9 heirs of the late J. J. B. Kingsbury, and the entire property being subject to the dower interest of Mrs. Jane C. Kingsbury:

To have and to hold the same to the said grantee, his heirs and assigns forever, the grantor covenanting that — will warrant the property hereby conveyed.

In witness whereof we have hereunto set our hands and seals, at Louisville, this fifteenth day of May, 1861.

SIMON B. BUCKNER. [SEAL.]
MARY K. BUCKNER. [SEAL.]

STATE OF KENTUCKY, }
County of Jefferson, } *sct:*

Be it remembered that on this fifteenth day of May, A. D., 1861, before me, C. L. Thomasson, a notary public in and for said State and county, duly commissioned and qualified, personally appeared Simon B. Buckner and Mary K. Buckner, his wife, who are personally known to me to be the persons whose names are subscribed to the foregoing deed as having executed the same, and acknowledged that they had executed the same for the uses and purposes therein expressed; and the said Mary K. Buckner, wife of the said Simon B. Buckner, being of lawful age, and having been by me, separate and apart from her said husband, examined and the contents of the said deed fully made known and explained to her, acknowledged that she had executed the same and relinquished her

dower to the lands and tenements therein mentioned voluntarily and without compulsion of her said husband.

In witness whereof I have hereunto set my hand and affixed my official seal this 15th day of May, A. D. 1861.

C. L. THOMASSON,

10 *Notary Public for Jefferson County, Kentucky.*

Abs. 55 and 56.

That at the time of signing, ensealing, and acknowledging this said conveyance one D. W. Mitchell was the general agent of the said Henry W. Kingsbury, now deceased, having in charge all his said real-estate interests, as the said Buckner and wife then well knew, and they, with the intent to deliver the said conveyance effectively, and so as to pass title immediately, viz., on May 16, 1861, delivered the same to said Mitchell, to the end that the same might be recorded, and it was by direction of said agent recorded, in the records of Cook county, Illinois, in Deed Book No. 212, page 624, on the 17th day of May, 1861; and the said agent duly entered the said transaction on the books of his agency and credited himself with the expense of such record.

And, as your orator is informed and believes and so charges, the said deed was so delivered to such agent with intent on the part of said grantors to pass the title thereby, and such conveyance was accepted and acted on by the father of your orator, who, by virtue of such conveyance and not otherwise, entered into the full, exclusive, and undisputed possession of all and singular the property embraced in the said deed of conveyance from the said Buckner and wife as the real and beneficial owner thereof, subject only to the dower interests of his mother, Jane C. Kingsbury, and the encumbrances aforesaid; and your orator shows unto the court that the said Henry W. Kingsbury in his lifetime, being in possession of all of said property under such claim and color of absolute title, executed powers of attorney to transact business touching all said lands running in his own name and that of Jane C. Kingsbury as the sole owners thereof; that he was, by his agents, in receipt of all

11 the income therefrom, and by such agents exercised exclusive control over the disbursements of all the revenue and over the entire business connected with the management of the said real estate included in said conveyance and every part thereof; and your orator further shows that from and after said conveyance up to death of said Henry W. Kingsbury that all and singular the leases and contracts of and concerning said real estate were executed in his name as the sole and only owner of said property, subject to the dower right of Jane C. Kingsbury.

And your orator further shows that, being so in possession of all and singular the said real estate descended and conveyed as aforesaid, the said Henry W. Kingsbury departed this life on September 17, 1862, and all and singular his property, real and personal, descended to and became vested in your orator as his sole heir-at-law, subject to the two dower interests aforesaid.

And your orator further shows that after the death of his father

his mother was, by the circuit court of the District of Columbia, on the — day of January, 1863, duly appointed guardian of his person, and that by an amicable arrangement between Jane C. Kingsbury and the mother of your orator, in her own right as dowress and as guardian for your orator, John H. B. Latrobe was appointed a common agent under a letter of attorney signed by the mother of your orater and said Jane C. Kingsbury, and he went into possession of all and singular the said real estate originally descended to said Henry W. Kingsbury, your orator's father, and also that embraced in the said conveyance of May 17, 1861, from said Buckner and wife, and from about — day of ——, 1863, continually until the — day of ——, 1869, was in open and notorious possession of all said real estate and enjoyment of all and singular the income therefrom,
12 claiming the same as the sole and absolute property of your said infant orator, subject to the dower rights of said Jane C. Kingsbury and the mother of your orator and the encumbrances aforesaid, and to no other liens, equities, or trusts whatever, and expressly repudiating and denying any equitable interest in any other person or persons whatever; and continuously from the decease of the father of your orator, in 1862, until in the month of July, 1870, the said estate so descended to said Henry W. Kingsbury, deceased, and also the estate vested in him by virtue of the conveyance from said Buckner and wife, was in the exclusive custody and control of the said Latrobe or some other agent appointed to manage said property by said Jane C. Kingsbury and said Eva Lawrence, or by the receiver appointed by the circuit court of Cook county, as is more fully hereinafter set forth, and was so held, managed, and controlled by each and every of such persons as the property of your orator, and not otherwise.

And your infant orator further shows unto your honors that on the 11th day of July, 1870, a certain paper, purporting to be a copy of a will executed by the father of your orator on the 25th day of March, 1862, at Fortress Monroe, Virginia, and the proof thereof made in the corporation court for the city of Alexandria, in the State of Virginia, on May the 9th, 1870, and certified according to the provisions of section 8 of the Statute of Wills of the State of Illinois, was presented to the county court of Cook county by the procurement and at the instance and request of the said Buckner and wife and said Jane C. Kingsbury, claiming to be devisees under such will and seeking to probate and establish the said document as
a valid will, to the end that the said Mary K. Buckner might
13 obtain a devise thereunder, and thereupon the said county court of Cook county ordered the said certified copy of said will to be recorded in said county court in the manner authorized by the laws of the State of Illinois. A copy of the said paper, together with the order of the court thereupon, is set forth fully and at large in the paper which is annexed to this bill of complaint and marked "Exhibit A," at page 9.

Your said infant orator further shows to the court that at the time of said proceedings in said county court of Cook county he was a non-resident of the State of Illinois and was not at said date

within this State, and had no notice whatever of said attempted proceedings to procure a record of said certified copy of said paper purporting to be the will of said Henry W. Kingsbury, deceased.

And your orator further shows that on the 19th day of July, 1870, a bill in chancery was filed in the circuit court of Cook county, in the State of Illinois, in the name of your orator, by Corydon Beckwith, who tendered himself as the next friend of your orator, against Ambrose E. Burnside, Mary J. Buckner, Simon B. Buckner, Jane C. Kingsbury, John J. D. Kingsbury, Eva Lawrence, and Albert G. Lawrence, wherein was set forth the heirship of your orator and the seizin of his father of an estate of inheritance in and to all and singular the lands aforesaid and the presentation of said certified copy of said paper purporting to be a will of Henry W. Kingsbury, deceased, to the county court of Cook county, together with the order of said court thereupon, and it was in and by said bill prayed that said instrument purporting to be such last will and statement of said Henry W. Kingsbury, deceased, might be declared invalid and of no legal force and effect as a last will and testament as against your orator being such posthumous child as aforesaid,
14 and that the proceedings of said county court admitting such document to record should be set aside and decreed to be void as constituting a cloud on the title of your orator, and that said defendants might be restrained from interfering with the said estate so vested by inheritance in your orator in consequence of the devises contained in the said paper-writing and under which they claimed.

And your orator shows that no process was at any time ever sued out upon said bill in chancery against any of the defendants named therein; that each and every of said defendants were at the time of filing of said bill non-residents of the State of Illinois, and that no publication such as is required by the statute of the State of Illinois in case of non-resident defendants was ever made or attempted to be made as against any of said named defendants; and your orator is advised and charges that the said bill was originally filed in pursuance of some kind of understanding or agreement had between said Beckwith and the said Buckners, and that they would enter their appearance thereto.

And your orator further shows that it appears by the record of such cause that on the 31st day of October, 1870, Mary K. Buckner and Simon B. Buckner appeared by counsel and filed in the circuit court an answer to the bill of complaint exhibited in the name of your orator, and on the 22nd day of November, 1870, Jane C. Kingsbury appeared to said action by counsel and filed an answer to said bill of complaint, and on the 6th day of December, 1870, Ambrose E. Burnside and John J. D. Kingsbury, appearing by counsel, filed a joint and several answer to said bill of complaint, and on the 24th day of December, 1870, general replications were filed in the name of your orator to said answers, and on the 31st day of October, 1870, the said Mary K. Buckner filed in said cause a paper, termed
15 by them a cross-bill, against your orator, said Eva Lawrence, Albert G. Lawrence, and Jane C. Kingsbury, setting up that

a certain conveyance executed by said cross-complainants, bearing date May 15, 1861, purporting to convey certain property in the city of Chicago to said Henry W. Kingsbury, should be declared to be a deed of trust for the use and benefit of the said cross-complainants or one of them; that upon the facts attending such conveyance a resulting trust arose; that your said infant orator should be required by the decree of that court to reconvey the property in accordance with such trust; that an account should be taken of the receipts and disbursements of your orator, and acting for him, of and concerning the said property; that dower should be ascertained and set off to said Jane C. Kingsbury and Eva Lawrence, and that partition should be made of said estate and possession of the property embraced in said deed restored to said cross-complainant. Your said infant orator shows that it appears in and by said record that on the 25th day of November, 1870, said Corydon Beckwith was, upon the motion of said cross-complainants, appointed a guardian *ad litem* for your orator as defendant to said pretended cross-bill, and that on the 2nd day of December, 1870, an answer was filed by said guardian *ad litem* in the name of your orator to the said cross-bill, and on the same day answers were filed to said cross-bill in the name of Eva Lawrence and Albert G. Lawrence, and that no answer was ever filed to said so-called cross-bill by Jane C. Kingsbury.

And your orator further shows that it appears in and by the record of said proceedings in said circuit court that after certain testimony had been taken by depositions upon the part of said Simon B. and Mary K. Buckner that on the 31st day of December, 1870, a hearing of said original and cross bill was had and a final decree was rendered as of the 24th of December, 1870, by which
16 both the original and the cross bills were dismissed without prejudice; and it further appears in and by the said record that the next friend of your orator prayed an appeal, and, the bond being waived by said Buckner and wife, it was allowed, and the said cross-complainants, Mary K. Buckner and Simon B. Buckner, also prayed an appeal from the decree dismissing their cross-bill, and bond was waived by said Beckwith pretending to act as guardian *ad litem* for your orator; that such appeals were by agreement of record to be prosecuted to the January term, 1871, of the supreme court of the *United* States of Illinois for the central grand division.

And your orator further shows that certain errors having been assigned on the said record by the said Mary K. Buckner and Simon B. Buckner in the said supreme court of the State of Illinois for the central grand division in January, 1871, that on the 5th day of October, 1871, the said last-mentioned court delivered an opinion, whereby the decree of the said circuit court was reversed, and the said causes were remanded with certain directions to the circuit court, which are set out at large in the said decree of said supreme court.

And your said infant orator shows unto your honors that the said Beckwith wholly failed to file any petition in behalf of your orator praying a rehearing in the said supreme court, and that said decree of said supreme court and mandate was filed in the said circuit court

of Cook county on the 13th day of November, 1871; that thereupon and without the hearing of any new testimony whatever a decree was, upon the motion of said cross-complainants, Mary K. and Simon B. Buckner, enrolled in said circuit court, purporting to be in execution of the said mandate of the supreme court and to embody the principles thereby decided, and on the 14th day of November, 1871, acting under the said decree, John Woodbridge, as
17 master in chancery of said circuit court, executed and delivered a conveyance purporting to transfer from your orator and vest in the said Mary K. Buckner a full undivided half of all and singular the property of the said Henry W. Kingsbury, deceased, which had descended to and become vested in your orator, which said deed was by said court approved and confirmed on the — day of January, 1872, and on motion of said cross-complainants it was by said circuit court ordered and decreed that the said Mary K. Buckner was entitled to a partition of said real estate on the basis of one-half interest, and commissioners were appointed to set off her share of said property to hold unto her in severalty.

And your orator further shows that the said commissioners filed with said court, on the — day of January, 1872, their report in writing making partition of all and singular said estate as between your orator and said Mary K. Buckner, and on the — day of ——, 1872, the said circuit court entered a further order approving the said report of such commissioners in partition except to one parcel of land, commonly called the Spencer tract; and it was further ordered by the said circuit court that the said cause and the matter set forth in the said cross-bill against your infant orator should be referred to a special master for the purpose of stating an account and charging your orator with the rents and profits derived from the said estate continuously from the death of said Henry W. Kingsbury, deceased, to the enrollment of said decree, and by the decree of said circuit court a writ of assistance was issued under its authority, and the said Mary K. Buckner was, on the — day of January, 1872, placed in full possession of all and singular the said property so set off to her by said partition, so far as the same was confirmed, and being of the value of about $800,000; and your
18 orator herewith exhibits unto your honors a full, true, and complete transcript of the entire record and proceedings of said circuit court of Cook county, and also the decree of said supreme court of the State of Illinois and the decree entered upon the reversal of said cause, the master's deed to said Mary K. Buckner, and the order and decree of said circuit court making and confirming petition of said property and awarding possession of the share set off unto said Mary K. Buckner, which said exhibits your orator prays may be inspected by your honors and taken as part of this bill of complaint; and on the 28th day of February, 1872, the said Simon B. Buckner and wife conveyed unto R. W. Wooley, of Louisville, Kentucky, all the tracts so set off to Mary K. Buckner, and on the same day the said Wooley reconveyed under Simon B. Buckner all and singular the real estate aforesaid, and the said Simon B. Buckner is, as your orator is advised and believes, and so charges,

in the present full possession and enjoyment of all said property and its income, claiming to be sole beneficial owner by reason of the judicial proceedings aforesaid and the conveyance of said Wooley, and not otherwise.

And the said Simon B. Buckner and Mary K. Buckner do now give out and pretend that the said legal proceedings aforesaid instituted and prosecuted as appears in and by the record thereof, herewith exhibited unto the court and as hereinafter set forth, are in all respects valid, regular, and operative and binding upon your orator and upon his estate, and that by virtue of the said decrees, appeals, orders, partitions, and conveyances a complete and perfect title at law and in equity has become vested in them for the full half of the estate descended to your orator, and a further right to compel your orator to account to them for the income of such half from 1861 continuously to the date of entering said decree of 1872.

19 Whereas your orator claims and will to this court insist that said entire judicial proceedings against your orator and the decree in favor of the said parties is fraudulent, collusive, erroneous, and wholly insufficient to bind or conclude your orator in any respect.

For that the said decree was obtained by the habitual use of incompetent, illegal, and prohibited testimony on the part of said Buckner and wife, to which said Beckwith consented; that, as appears by the said record, the said circuit court of Cook county and the said supreme court of Illinois never had any jurisdiction over the person of your orator or the subject-matter of said cross-bill to decree as to such pretended trust or to order a conveyance divesting your orator of his estate or to decree partition of his property or award possession thereof or to compel your orator to account for the income of any part thereof.

And your orator further claims that the said Buckner and wife also procured the said decree against your orator by fraud and misrepresentation and by the concealment of divers important facts material to the controversy and the use of false and fraudulent pleadings and testimony, the particulars of which are set forth at large hereafter.

And that the said Beckwith had for many years been counsel for said Buckner, and was fully cognizant of the said material facts concealed from the court, and negligently and collusively assisted the said Buckners in such concealment, and failed to offer any proof as to such matters or to bring the rights of your orator to the notice of the court.

And by reason of such errors, irregularities, want of jurisdiction, and fraud your orator avers that he ought not in equity,

20 being such infant as aforesaid, to be in any manner concluded by the said judicial proceedings and decree, but that, on the contrary thereof, he is entitled to show such matters in this court and to have the said decree and all proceedings thereunder declared to be erroneous, fraudulent, and void and of no binding force against your orator, and to a decree requiring the said Buckner and wife to restore to your orator all his estate which they have seized upon by

virtue of such judicial proceedings or allowing him to file a new answer to said pretended cross-bill and introduce evidence therefor in his own behalf and make a new defence thereto.

And your said infant orator charges the fact to be and that it so appears upon the face of said judicial proceedings that no objection was made by the said Beckwith to the filing of said so-called cross-bill by Mary K. Buckner and Simon B. Buckner, and your orator was at the time of the filing of said cross-bill against him in the said State court a non-resident of the State of Illinois and was not within this jurisdiction at any time from the date of the filing of said cross-bill until the time of the pretended enrollment of the decree in the State court on said cross-bill; that no process was ever sued out upon said cross-bill or served upon your orator, nor was any publication such as is required by the statute in the case of non-resident defendants made against your orator, but the only jurisdiction acquired over your orator to decree as to the matters contained in said cross-bill was by the appointment of a guardian *ad litem* upon the 25th day of November, 1870, upon the motion of said cross-complainants, Mary K. and Simon B. Buckner, and the answer filed in the name of your orator by such guardian *ad litem* on Dec. 2, 1870.

21 And your orator further shows that the filing of said cross-bill and the appointment of said guardian *ad litem* and all and singular the action and conduct of said cause from and after the filing of said cross-bill until the 31st day of December, 1870, are each and every of them matters to which your orator is an entire stranger, and that he had no actual or constructive knowledge of such matters or any of them; that the filing of said cross-bill and the matters thereof and the relief prayed therein was not brought to the notice of the guardian of the person of your orator nor any of his friends or relatives having his interest in charge, nor did they or any of them have any notice whatever of the appointment of said guardian *ad litem* or of the filing of the answer by such guardian *ad litem* or the nature thereof or the action thereupon, nor was any equity at any time made of the guardian of the person of your orator or any of his friends and relatives as to the existence or production of any evidence to disprove or qualify the matters set forth in said cross-bill or any material averment thereof or to produce any testimony that would be of avail to protect the title of your orator by inheritance in and of the estate, the legal title of which descended to your orator upon the death of his father.

And your orator is advised by counsel and so charges that the said cross-bill of said Mary K. and Simon B. Buckner, so exhibited in manner and form as aforesaid against him in said State court, is not germain to the matters set forth in the original bill exhibited in said court in the name of your orator, and that the matters set forth in said cross-bill and the relief prayed at the foot thereof constitute, under the rules and practice of equity, a new and substantive litigation entirely independent and not growing out of the matter set forth in the original bill in said cause, and having no

22 dependence thereupon; and your orator charges that by

reason of the premises the said circuit court of Cook county had no jurisdiction whatever of the person of your orator as to such matters or to entertain the said cross-bill against your orator, to enter any decree thereupon divesting your orator of any of the real estate before that vested in him by the death of his father, or to decree partition or assign dower or call upon your orator to account as a constructive trustee; and your orator charges that the decree of the court declaring that your orator was not the beneficial owner of an undivided half of the property descended to him and held by him continually from 1862 to 1870 as aforesaid, and vesting the same in said Mary K. Buckner, and the conveyance to said Mary K. Buckner and the decree of partition thereupon and the award of certain portions of the real estate of your orator unto said Mary K. Buckner, to be held by her in severalty, are each and every of them acts, decrees, and orders of said court based upon the said cross-bill and not otherwise, and are each and every of them, as your orator is advised, utterly void and of no effect for want of jurisdiction in the said circuit court over your orator and over the subject-matter of said cross-bill, at the foot of which they were decreed.

And your orator shows unto your honors that it appears on the face of the said record that the said Beckwith wholly failed to question by plea, demurrer, objection, or otherwise the jurisdiction over the person of your orator or over the subject-matter set forth in said cross-bill either in the said circuit court of Cook county or the supreme court of the State of Illinois; but that apparently the appearance of your orator was entered to the said cross-bill by the filing of an answer by a guardian *ad litem* without objection and in pursuance of the same amicable arrangement by virtue of which
23 the said Mary K. Buckner and others entered their appearance without process unto the bill exhibited against them in the name of your orator, and that the whole controversy was conducted as an agreed case between said Beckwith and said Buckners without any notice to or assent of the relatives of your orator; but your orator, being such infant as aforesaid, claims that the said guardian *ad litem* had no authority to enter the appearance of your orator to said cross-bill or waive any objection to the jurisdiction of said court over the person of your orator or to the subject-matter set forth in the said cross-bill, or *bar* blind or bar your orator of any of his rights by agreeing to submit the same to the result of any such litigation as aforesaid.

And your orator further shows that it appears by said record that to support the matter set forth in the said cross-bill and to obtain the decree in said supreme court and in the said circuit court establishing and enforcing such alleged trust, and thereby investing themselves with the estate of your orator, the said Buckner and wife, with the consent or acquiescence of the said Buckners [Beckwith], made use of the testimony of said Simon B. Buckner, and your orator shows that the use of said testimony was illegal, prohibited, irregular, and fraudulent because—

1. When notice to take such testimony was served on and accepted by said Beckwith on Nov. 22, 1879, he had not been appointed

guardian *ad litem*, and had no authority to act for or represent your orator in that capacity.

2. The said notice served on Nov. 22, 1870, specified that a commission would be sued out thereunder in eight days thereafter instead of ten, as required by law.

3. That after the consent of said Beckwith falsely signing
24 himself guardian *ad litem* on Nov. 22, 1870, the said Buckner and wife caused new and other interrogatories to be attached to said notice, no copy of which was ever served on any one purporting to represent your orator.

4. That, as shown by the said record upon which the decree of said supreme and circuit courts was obtained by said Buckner and wife, *that* the commission under the authority of which the said deposition of Buckner was taken, returned, and used was in fact signed, sealed, and tested on Nov. 29, and not on the day specified in said notice.

5. The said Simon B. Buckner was an incompetent witness and expressly prohibited from giving any testimony whatever in a cause wherein his wife was a party and the object of which was to establish a trust in behalf of his wife and himself in your orator's property.

6. All the testimony of said Buckner which was material to the controversy consisted of his giving in evidence the declarations of himself and his wife and conversations with the father of your orator, then deceased, for the purpose of affecting the estate descended to your orator as heir-at-law of said Henry W. Kingsbury.

7. The only foundation for the reception of said deposition in evidence was the illegal and wrongful consent of the said Beckwith, as the same was neither taken, returned, or published, as directed by law.

And, notwithstanding such testimony was illegal, prohibited, and incompetent to be read in said cause, the same was fraudulently made use of by the said Buckner and his wife, and such use was consented to or acquiesced in by the said Beckwith, and the said illegal testimony was not only material to but was controlling in the said issue of the said trust, and the illegal and incompetent character of the same was not in any manner or at any time brought to the
25 notice of either the circuit or supreme court by the said Beckwith, and the said Buckner and wife do not give out and pretend that your orator is conclusively bound by the said consent and laches of the said Beckwith; whereas your orator charges that the use of such illegal testimony with the consent of said Beckwith, and thereby obtaining a decree against your orator, is error apparent on the face of said record, and was a fraud upon the rights of your orator.

And your said orator further shows unto your honors that on the 5th day of December, 1870, the said cross-complainants, Buckner and wife, caused notice to be served upon said Beckwith, as guardian *ad litem* for your infant orator, that a commission would be sued out of said circuit court upon the 14th day of December, 1870, to take the testimony of one William F. Barrett, and your orator charges that it is apparent in and by the record of said proceedings, which your orator

prays to be inspected in this regard by the court, that said nine days' notice, which was illegal and incompetent under and by the laws of the State of Illinois, was accepted and consented to by the said Beckwith as guardian *ad litem* for your orator, and that any longer notice was by him specially waived.

And so your orator charges that, as matter of law, the said notice and the commission sued out thereupon were illegal and void, and that the deposition taken in pursuance of such notice and commission should not of right have been read as against your orator, and that the taking of such deposition and reading the same in evidence against your orator and procuring a decree against your orator by reason of such illegal testimony, based only on the said illegal and collusive consent of said Beckwith, is an error apparent upon the face of the record in said cause, and was and is a fraud upon
26 the rights of your orator.

And your orator further shows that it appears in and by the said record of proceedings on the said appeal to the supreme court that the same was taken and read in evidence without any commission whatever to the said George M. Davis, purporting to have taken and certified to said deposition as a commissioner, and that nothing whatever in the said record shows that the said Davis had any lawful authority to take or certify the deposition of said witness, and your orator charges that the same is not taken in pursuance of any statute of the State of Illinois, and was utterly incompetent to be read as evidence against your orator in order to divest him of his title and property; and your orator shows that, notwithstanding the premises, no objection was made in the said circuit court to the said deposition of said Barrett or any motion to suppress the same by the said Beckwith, and that in the said supreme court no error whatever was assigned upon the admission of such deposition as evidence, but the said deposition was tendered and used as competent testimony by the said cross-complainants, Buckner and wife, relying on the consent and acquiescence of said Beckwith, they well knowing that the same was illegal and incompetent, but fraudulently contriving and intending to make use of it to injure your orator and deprive him of his estate.

And your orator thereupon charges that such matter is manifest error appearing upon the face of said decree, and was a fraud upon the rights of your orator, and that the decree obtained by reason thereof ought not to conclude your orator.

And your orator further shows unto the court that nearly the entire deposition of said Barrett consists of statements and declarations of the said Mary K. and Simon B. Buckner made to the
27 said Barrett in the absence of your orator or of the said Henry W. Kingsbury, now deceased, and introduced solely for the purpose of contradicting and impeaching a solemn deed of record, and thereby divesting the title vested in your orator by descent from his father, and to obtain a decree transferring such title to the said Buckner and wife, or one of them, who made such declaration.

And your orator shows that no objection was taken to the inter-

rogatories calling for such declarations nor to the answers to the same, nor was any motion made to exclude the same in said circuit court nor error assigned upon the same in the said supreme court, but your orator charges that such testimony was illegal and incompetent, and that the tender of such testimony and their own declarations in manner and form as aforesaid by the said Simon B. and Mary K. Buckner to subserve their interests and defeat the legal title vested in your orator, relying on the consent and acquiescence of the said Beckwith thereto, is manifest error apparent on the face of said record and a fraud upon the rights of your orator.

And your orator further shows unto the court that the depositions of Mrs. Jane C. Kingsbury and Ambrose E. Burnside were each taken upon commissions sued out of the said circuit court upon notice served upon the person appointed guardian *ad litem* of your orator, wherein written waivers was [were] entered of the rights of your orators to longer notice; and your orator further shows that said Jane C. Kingsbury and Ambrose E. Burnside were parties to said legal proceedings and directly interested in the event thereof, and claiming adversely to your orator, and charges that each of the said witnesses were, under the laws of the State of Illinois, incompetent to testify in behalf of said cross-complainants and as against the interests of your orator as the heir of said Henry W. Kingsbury,
28 and were especially incompetent to testify to any fact occurring before the death of said Henry W. Kingsbury or as to any of his parol declarations made to them or either of them in his lifetime for the purpose of defeating the estate or title vested in your orator by inheritance from his said father.

And your orator charges that, with full knowledge of such incompetency, the deposition of said parties to said action was taken by said Simon B. and Mary K. Buckner with the fraudulent intent to make use of said illegal and prohibited testimony to secure a decree in their favor and against your orator, and that such evidence was material to the issue and absolutely necessary to justify any decree against your orator, and your orator shows that all the material portion of the deposition of said Jane C. Kingsbury and Ambrose E. Burnside consists of testimony as to facts occurring prior to the death of said Henry W. Kingsbury and to declarations made by him to said parties in his lifetime, and your orator shows that no exception was filed in behalf of your orator by said Beckwith as guardian *ad litem* to the interrogatories put to said witness calling for such facts and declarations, nor any motion made to suppress such depositions or strike out such parts thereof as related to the declarations of said Henry W. Kingsbury and facts occurring prior to his death, but the said testimony, in manner and form aforesaid, was introduced and used by the said cross-complainants to support the charges made in their said cross-bill against your orator and to defeat the estate of inheritance vested in your orator by the death of said Henry W. Kingsbury, and the said Beckwith wholly failed, neglected, and refused to bring such matters to the notice of either the circuit or supreme court at any time; and your orator charges as matter of law that the taking and making use of such incompetent and pro-

hibited testimony for the purpose of procuring a decree
29 divesting your said infant orator of his estate is manifest error apparent on the face of said record, and that the decree obtained and based on such illegal evidence introduced into the record by the consent of said Beckwith is a fraud on your orator.

And your orator further shows unto your honors that, as disclosed by the record of said proceedings, the said cross-complainants also, on hearing of said cause in said circuit court, introduced in evidence the pretended depositions of D. W. Mitchell, John D. Shortal, and John Woodbridge, and that it appears in and by the record of said cause that said depositions were each and every one of them taken without any order of said court of chancery, without notice served upon your orator or anybody authorized by law to represent him, — without the issuing of any commission or the service of any interrogatories, and that said depositions are not taken or certified or returned in accordance with the laws of the State of Illinois, but are admissible in evidence solely by reason of some illegal and collusive consent of said Beckwith.

And your orator further shows that, notwithstanding such depositions were not taken in accordance with law and were not entitled to be read upon the hearing of said case to the prejudice of your orator, *that* no exception was made in said circuit or supreme court to said depositions or any of them or any motion made to suppress the same by said Beckwith, but that such illegal taking and use thereof were expressly consented to by him; and thereupon your orator charges that the introduction of such incompetent testimony by the said Buckner and wife, being material to the issue and with intent to procure a decree against your orator by reason thereof, is manifest error upon the face of the record of said cause, and was conceived and executed in fraud of the rights of your orator.

30 And your orator further shows that it appears in and by the record of said cause that on the 31st day of December, 1870, the said original bill filed in the name of your orator and the said cross-bill filed by said Buckner and wife came on to be heard on the pleadings and the evidence aforesaid, and that on the said 31st day of December, 1870, a final decree was rendered dismissing said original — and cross-bill without prejudice, and it was then and there ordered on said 31st day of December, 1870, that such final decree of dismissal should be entered as of the 24th day of December, 1870; and it further appears in and by the said record that the said Mary K. Buckner and Simon B. Buckner prayed an appeal from the decree dismissing their said cross-bill, and, bond being waived, it was allowed.

And your orator further shows that it appears by said record that the replications were filed in the name of your orator by his next friend unto the answers of said Buckner and wife and others on the 24th day of December, 1870, and that under and by virtue of the statutes of the State of Illinois then in full force and effect the said cause stood for hearing at the next term of said circuit court of Cook county beginning, to wit, on the 16th day of January, 1871, and not before; and your orator charges and will insist that the

disposal of said cause and the entry of any final decree and the allowance of any appeal therein prior to the said January term, 1871, was without jurisdiction and illegal, and that the said transactions of said court at the same term and on the very day when the said replications were filed was void and of no effect, and was produced by the said Buckner and wife contrary to law and solely by the illegal and collusive consent of said Buckner and in fraud of your orators's rights.

And your orator is informed and believes and so charges that
31 although by said record it is recited that at the said December term the said cause came on for final hearing on the pleadings and the evidence and proofs taken and produced and read in evidence, and that the court, being sufficiently advised in the premises, did order, adjudge, and decree certain matters, yet in truth and in fact the said recitals, each and every of them, are false and fraudulent, and that the said cause never was at any time heard or considered by the said circuit court, nor was any evidence ever at any time produced, offered, or read to or considered by said court, nor did said court at any time set down the cause for hearing, order publication of any deposition in the said cause, or render or adjudge anything whatever in the said cause, but the said recited order and decree was entered in the said records without any hearing or judicial action of the court, and solely by virtue of a collusive and illegal agreement between and procurement of the said Beckwith and the said Buckner and wife, and in no manner or otherwise.

And your orator charges as matter of law that the said Buckner and wife having consented to and procured the entry of a decree dismissing their said cross-bill, that it was illegal and irregular for them to pray an appeal from the decree which they had caused to be entered, and that no error could be by them assigned upon such consent decree, and that no jurisdiction would attach in the supreme court on an appeal from such voluntary dismissal, and that it was a fraud on the rights of your orator for the said Beckwith to consent to an appeal by the said Buckner and wife from the very decree which they had caused to be entered and assign error upon it as the act of the court.

And your orator shows that while the said cause never was heard by the court and no evidence ever produced or read the said
32 Buckner and wife and said Beckwith, in order to support the sham hearing aforesaid and better bind and bar your orator, fabricated a certificate of evidence, arbitrarily prepared by themselves, embracing such matter of evidence as they thought would bar your orator if made part of the record, and having so prepared the said certificate of evidence falsely and fraudulenty reciting the introduction in evidence on the hearing of the divers items of evidence therein set out at large, the said Buckner and wife and the said Beckwith went to a judge of said circuit court who had never had anything to do with the said cause and had never heard the same and procured him to sign the said certificate of evidence by representing to him that it was a matter to which the parties consented; and your orator charges that in truth and fact up to the said 31st

day of December, 1870, as shown by the record, the several depositions taken as aforesaid had never at any time been published or opened by order of the court, and the contents thereof, if truly recited in the said fraudulent certificate of evidence, could only have been obtained by the said Buckner and wife and the said Beckwith by illegally breaking the seals of said several depositions.

And your orator charges the truth to be that not a single deposition, deed, patent, map, or paper writing or stipulation of any kind was ever produced in court or read in evidence or inspected or considered by the said circuit court of Cook county, nor did said court direct what should be embraced in the said certificate of evidence, but the said items of evidence and every one thereof were falsely and fraudulently contrived as aforesaid by the said Buckner and wife and said Beckwith to accompany said sham hearing, and was by them procured to be signed by the said judge and made a part of the record, and upon the said appeal the said Buckner and
33 wife made use of the matters incorporated in the said fabricated certificate of evidence and obtained a decree in their behalf, thereby well knowing that the recitals therein were false and fraudulent, and were agreed on between themselves and said Beckwith as aforesaid.

And your orator shows that while it now appears in the said record that in the said cross-bill of said Buckner and wife it was charged that the said pretended trust in their behalf was sufficiently manifested and proven by a letter signed by the father of your orator, as explained by a conversation with said Jane C. Kingsbury, also set forth in the said cross-bill, yet in truth and fact when the said cross-bill was filed and when the answer thereto in the name of your orator was filed and when issues were closed by the replications of said Buckner and wife none of the statements or allegations aforesaid were in the said cross-bill; but after the contents of the deposition of Jane C. Kingsbury, taken in Connecticut on December 20th, 1870, had in some unlawful manner become known — the said Buckner and wife they, with the consent of said Beckwith and without leave of or notice to the court to amend or the withdrawal of their replications, illegally and fraudulently inserted all the said allegations as to said letter and conversation in the cross-bill in order to have the said pleadings appear upon the record to have always contained the said allegations as to such written evidence of said trust, and, having so falsified the record, they procured a decree upon the very allegations which had been thus surreptitiously introduced into the said cross-bill as aforesaid.

And your orator shows that there never was any issue joined on the said allegations as to the said letter manifesting said trust and no opportunity given your orator to take proof upon or contest
34 the said allegations, and that the procuring a decree thereupon in manner and form aforesaid depriving your orator of his estate was erroneous, contrary to law, and a fraud on the rights of your orator.

And your orator charges that as a matter of law it is manifest error upon the face of said decree and contrary to law that an ap-

peal was allowed to the said Mary K. Buckner and Simon B. Buckner without the executing and filing of a proper appeal bond as required by law, and that the pretended waiver recited in the said decree made by the said Beckwith was utterly void and of no effect to entitle the said Mary K. Buckner and Simon B. Buckner to an appeal from the decree dismissing said cross-bill except upon the execution of a proper appeal bond, as required by law.

And your orator further charges that there is further manifest error appearing on the face of said proceedings, in this, to wit, that while in truth the said final decree was entered by consent as aforesaid on the 31st day of December, 1870, it was by the procurement of the said cross-complaints, and said Beckwith falsely and fraudulently antedated as of the 24th of the same month, so that said final decree might be of an apparent date more than ten days prior to the first day of the next term of the supreme court of the State of Illinois, sitting in the central grand division, beginning, to wit, on the 4th day of January, 1871.

And your orator further shows unto your honors that it appears in and by the face of the said record that the appeal from said final decree was to be prosecuted, as the record recites, by agreement of the parties to the January term, 1871, of the central grand division, and thereupon your orator charges that because the said supreme court of the State of Illinois could not at its January term,
35 1871, have disposed of any appeal from a decree of said circuit court of December 31, 1870, that, for the sole purpose of giving said supreme court apparent jurisdiction of said cause on appeal at that term, it was illegally and fraudulently contrived by the said Simon B. and Mary K. Buckner that the said final decree should be entered as of the 24th of December, 1870, so as to have more than ten days interval between said date of decree and the ensuing term of said supreme court.

And your orator charges that such collusive arrangement and the entry of such fictitious date is an error apparent on the face of said decree, and was conceived and carried out contrary to law and in fraud of the rights of your orator in said cause.

And your orator further charges in this behalf that under the constitution and laws of the said State of Illinois appeals from decrees in chancery in the circuit court of Cook county must be taken to the northern grand division of said supreme court, and that an appeal to the supreme court of any division of the State is illegal and unconstitutional unless with the consent of parties.

And thereupon your orator charges that he gave no consent to the prosecution of an appeal to the central grand division of said supreme court, and that, being an infant, said Beckwith, as guardian *ad litem*, had no authority under the law and the rules and practice of chancery to make any agreement or consent that said cause should be appealed, except as provided by the constitution and laws of Illinois.

And thereupon your orator charges that the whole proceedings of said supreme court in the said central grand division, in said January term, 1871, in the said cause appealed from, an agreed decree of the 31st of December, 1870, surreptitiously antedated as of the

24th of December, 1870, depended for jurisdiction solely upon such antedated and consented decree and the consent of said Beck-
36 with that said cause should be appealed and heard at the January term, 1871, of the central grand division and without a bond to justify said appeal; that said supreme court of said central grand division never had any jurisdiction over the subject-matter of said bill or over your orator, and that all proceedings in the said court are utterly void and of no effect as against your orator.

And your orator charges in that behalf that the entry of said fictitious date and the prosecution of said appeal without bond and to said central grand division of the supreme court and setting the same for hearing at the January term, 1871, and procuring a decree against your orator by reason thereof, constitute manifest error and want of jurisdiction apparent on the face of said record, and that the said decree of the supreme court obtained in manner aforesaid was collusive and fraudulent and wholly void as against your orator.

And your orator further shows that it is apparent in and by the said record of proceedings that although the said Mary K. and Simon B. Buckner assigned errors upon the said record upon the dismissal in said circuit court of their said cross-bill, that in truth and in fact there never was at any time a joinder in error upon the said record by your orator or his guardian *ad litem*, nor any rule therefor upon either your orator or his guardian *ad litem*, nor — the said Beckwith assign any cross-errors in the appeal of said cross-bill.

And your orator thereupon submits to your honors as matters of law upon the facts aforesaid, under the statutes of the State of Illinois and the rules and practice of said Supreme Court, that no jurisdiction was obtained over the person of your orator touching the matters of said appeal at such January term, 1871, of
37 said central grand division of the supreme court, and that the setting of said cause by said cross-complainants for submission at that time in manner and form as aforesaid is manifest error appearing upon the face of said decree, and was in fraud of the rights of your orator, and that the order, judgment, and decree of said supreme court, sitting in the said central grand division, was obtained by the fraudulent and illegal practices of the said Buckner and wife and Beckwith as aforesaid, and without any jurisdiction rightfully obtained over the person of your orator or the subject-matter of said pretended appeal, and that the said decree and opinion of said supreme court ought not in equity and good conscience to be made use of by said parties to said fraud to the injury of your orator, and that your orator is in no manner concluded thereby as to any of his rights or equities in and to the estate of his father vested in him by inheritance, but is entitled to be heard against the same.

And your orator further shows unto your honors that it was represented to the said circuit court of Cook county and unto the said supreme court by the said Buckner and wife in and by their said cross-bill that "said Henry W. Kingsbury during his lifetime made

no claim to the rents and profits of the real estate described in the deed of May 15, 1861, but that such rents and profits were received and controlled as before said deed was made by an agent acting for Jane C. Kingsbury, Henry W. Kingsbury, and said Buckner, and applied for the benefit of all of them as if no such deed had been made, and that the said Henry W. Kingsbury never exercised any acts of ownership or asserted any claim to the property inconsistent with such pretended trust," and the said Simon B. Buckner testified in substance to the truth of such statements, as appears in and by his evidence set forth in the records; and your orator avers that
38 the opinion and decree of the supreme court is based almost solely on the testimony of said Buckner, and that his evidence as to the disposition of the income and the management of the property as set forth in said cross-bill was an important and controlling element in the judgment of said supreme court and procuring such decree against your orator, but your orator charges the truth to be that the said Henry W. Kingsbury did, in October, 1861, take full and exclusive possession of all the real estate mentioned in the said deed of May 15, 1861; that from the said date until the time of his death Henry W. Kingsbury had exclusive possession by his agent, and that the leases of the property were made in his name and that of Jane C. Kingsbury as the only persons in any way interested in said property; that the property was not nor was any part thereof managed by an agent appointed in any way by said Buckner and wife, nor was the income or any portion thereof applied for the benefit of the said Buckner from and after the date of said conveyance of May 15, 1861, and that said Henry W. Kingsbury exercised acts of absolute ownership over said property by entering into possession, leasing, and managing the same as his own property and receiving and applying the entire income thereof by agents appointed by himself and without rendering any account thereof to said Buckner or wife.

And your orator charges that said Buckner was fully informed at the time of filing said cross-bill of the real facts touching the management, provision, and enjoyment of said property by said Henry W. Kingbury as above stated, but, notwithstanding said knowledge, did falsely and fraudulently set forth the allegations in the cross-bill as aforesaid, and did falsely and fraudulently support the said allegations by his oath and testimony as aforesand and conceal
39 the true state of facts from the court, well knowing them to be as aforesaid, with the intent and purpose by such practices to cheat your orator out of his estate and to procure the title of the same to be vested in himself, as he has done by such false allegations and testimony.

And your orator further shows that it was in said cross-bill by the said Buckner and wife as a matter material to the controversy and the rights of the parties that from the death of Julius J. B. Kingsbury until the death of Henry W. Kingsbury the property had been used solely to receive the rents and profits, and that Jane C. Kingsbury, Henry W. Kingsbury, and Mary K. Buckner had been treated as if each was entitled to a third, and this statement in

the said cross-bill was sustained by the testimony of said Buckner, as appears in and by the said record, and such averment and evidence were important and material to the controversy, as appears in and by the opinion of the said supreme court, and were received and relied on and were operative to procure the said decree and charge said pretended secret trust upon the lands of your orator.

And your orator charges the truth in that behalf to be that after the said lands had descended to Mary K. Buckner and Henry W. Kingsbury, up to about the year 1861, Simon B. Buckner had the entire management of all said estate; that during all the time he received and enjoyed or disbursed the income thereof as he saw fit; that during the minority of said Henry W. Kingsbury he caused a portion of said descended lands to be sold and conveyed, which were then worth about $75,000 and are now worth at least $200,000; that no part of the consideration of such conveyance was ever received by or accounted for to said Henry W. Kingsbury in his lifetime or your orator since; that the entire transactions were conducted by said Buckner, who has either appropriated the proceeds to
40 his own use or has so negligently conducted himself therewith as to be chargeable with such proceeds as though they had been collected; that during the period from 1856 to 1861 the entire amount of the income of said property received by said Henry W. Kingsbury did not exceed the sum of $300, while the residue of such income, after making such payments for improvements and to the dowress, Jane C. Kingsbury, as seemed best unto said Buckner, were appropriated by him to his own and wife's use, and amounted to at least $50,000, and besides the receipt of such income and the proceeds of such sales; that during the said Buckner's management of said property he caused encumbrances to be put on the property by way of mortgage to the amount of over $120,000 for money borrowed, and that while the said Henry W. Kingsbury joined in the said mortgage, yet the actual transactions were directed and carried out exclusively by said Buckner, who received all the money therefrom, and said Henry W. Kingsbury, as your orator is advised and believes, and so charges, never received a single dollar of any of the moneys derived from the divers encumbrances on such estate. Your orator is advised and believes that some portion of the mortgage money went to improve the property of the estate, but the said Buckner has never disclosed the accounts thereof, and your orator charges that at least $75,000 of the moneys derived from the mortgages on said common property were appropriated by said Buckner for the private use of himself and wife, and notwithstanding that from the death of said Kingsbury, in 1856, until 1861 the said Buckner received all the income of said property and the moneys derived from mortgages, and made sales of said property as aforesaid; he has never at any time made any division by thirds or made any report or disclosure whatever of his receipts or disbursements while acting in said capacity, but did suppress and conceal the same from your
41 orator and from the said circuit and supreme courts; and, well knowing the premises, and that it was untrue that the property had been used only to receive rents and profits, and that such

income had been divided into thirds as between Jane C. and Henry W. Kingsbury and said Mary K. Buckner, but that he had sold and encumbered the same to a large amount, and out of such sales, proceeds of incumbrance, and income had appropriated to his own use the entire net income therefrom, except the small sum aforesaid, the said Simon B. Buckner and Mary K. Buckner fraudulently concealed and secreted the real state of the accounts and such sales and encumbrances from the said courts, and wholly failed and neglected to disclose such matters in their said proceedings, and did falsely and fraudulently allege and produce testimony as aforesaid with intent thereby to procure a decree against your orator, divesting him of the full undivided half of his estate inherited, and to charge your orator with the rent and income of such undivided half continuously from May 15, 1861, up to the entry of such decree, without any reference to the sums arising from rents, mortgages, loans, and sales enjoyed by and chargeable to said Simon B. Buckner and Mary K. Buckner on account of their dealings with the estate as aforesaid, and at the date of said deed, in 1861, the whole property did not exceed in value $500,000, and the said Buckner had suffered the interest to accrue on all of said incumbrances and property to be sold for taxes and assessments, which were then uncancelled by him, and the whole property was, at the date of said conveyance, in great danger of being sold under foreclosure and the interest of both said Buckner and wife and said Henry W. Kingsbury therein entirely lost; and although, by reason of such dealings with the common estate, the share of the property remaining unsold justly belonging to said Henry W. Kingsbury at and before May 15, 1861, was
42 largely in excess of the one-half thereof, yet the said Buckner and wife, by reason of such concealments and fraudulent representations and practices, obtained a decree against your orator establishing a fraudulent trust in such lands descended to your orator to an amount greatly in excess of what they would be entitled in equity, even though it should be proven that they had executed the conveyance of May 15, 1861, in trust only to the said Henry W. Kingsbury, which said trust your orator wholly denies.

And your orator further shows that the said Buckner, in and by the said cross-bill and his testimony, in order to disclose an apparent and praiseworthy motive for the creation of the pretended trust in said cross-bill set forth and to fraudulently impose upon the court and strengthen his evidence as that of a wholly disinterested witness, represented by his pleadings and testified in evidence that he desired by said trust and by the decree to wholly and forever divest himself of all interest in and to the property which had been his wife's and so arrange it that his wife should be sole beneficiary thereof, whereas your orator claims that each and every of such pretenses were false and fraudulent and were part of the plan contrived by said Buckner to enable him the better to impose upon the court and by the nominal use of his name and pretended equity of his wife to secure unto himself, by his own oath, the title and enjoyment of one-half of all the estate of your orator; and your orator shows in that behalf that, upon the accomplishment of his purpose

to procure a decree against your infant orator by the use of his own illegal, incompetent, and fraudulent evidence and the suppression of the material facts aforesaid, the said Buckner and wife, on the 28th of February, 1872, conveyed the said property set apart to them by the decree in severalty to R. W. Wooley; said con-
43 veyance was without consideration and solely to enable said Wooley to reconvey the said property to Simon B. Buckner in his own right, which was done on the same day, and so it is that the said Simon B. Buckner is now in possession of such property, which is now of the value of at least $500,000, and claims to be the owner thereof, and is encumbering the same for his own profit and receiving and enjoying the income thereof, and having obtained the title thereto from your orator by such fraudulent practice aforesaid.

And your orator shows to the court that it appears in and by said record and upon the face of said cross-bill that said pretended trust arose in 1861 and long before the birth of your orator, and therefore your orator has no personal knowledge of the matters in relation thereto; but your orator denies that said Mary K. and Simon B. Buckner were the owners of an undivided half of said property described in said conveyance, and denies that any such trust ever existed or was declared by Henry W. Kingsbury as is represented in the said cross-bill and executed by the decree of this court in favor of said Buckner and wife.

And thereupon your orator, as against the claim and pretense of said Buckner and wife that Henry W. Kingsbury held title to all the property conveyed by the deed of May 15, 1861, only as their naked trustee to reconvey, shows to the court that said Henry W. Kingsbury went into possession and leased and managed the property as his own and in his own name; that he died in possession thereof; that no books of account or papers kept either by himself or any agent in any manner recognized the right of said Buckners to the property or its income or any part thereof or any interest therein; that after said deed and during the lifetime of the said Henry W. Kingsbury the Buckners received no part of the income nor made
44 any demand therefor, and that in and by the said paper purporting to be his will the said Henry W. Kingsbury dealt with the said property as his own, and that the said Buckner and wife claimed under such devises and sought to establish the same as a devise and not as a mere declaration of trust; that continuously from the death of said Henry W. Kingsbury until the filing of said cross-bill your orator was in possession of all said property and was in enjoyment of the income therefrom, claiming rightful title of his father and beneficiary under the trust created by Emily Spencer, and said Simon B. and Mary K. Buckner well knew such facts, and never at any time during said eight years made any claim to your orator or his guardian or relations or any one representing him that they were the equitable owners of one-half of said property, or disclosed or claimed any such pretended trust or made any demand for a reconveyance or for a share of the income of such property or for an account, or instituted any legal proceedings to declare any such

trust or compel a conveyance or account, and your orator or his guardian or relations never had any notice or knowledge or information that any such pretended trust or any trust whatever was claimed by said Buckners in said property until in the year 1871 and after the said cause had been appealed as aforesaid.

And, on the contrary thereof, your orator claims that the said conveyance of May 15, 1861, to said Henry W. Kingsbury was acquired in good faith by him, was executed and delivered to him without any fraud or mistake and for a valuable consideration, with intent to pass title to him, as appears by the terms of said deed, and that the said Henry W. Kingsbury entered into full and actual possession thereof, claiming title thereto, and that such possession of all such property under such claim and color of title was main-
45 tained continuously by said Henry W. Kingsbury and your orator, claiming by descent under him, from the year 1861 down to the date of filing said cross-bill, and during such nine years said Henry W. Kingsbury and your orator paid or caused to be paid all and singular the taxes which were levied and assessed upon the said property; and your orator claims and will insist that by virtue of such possession, claim, and color of title and payment of taxes your orator was, on the filing of said cross-bill, the absolute owner in fee simple of all and singular the said property, entirely free from all claim, right, or equity in said Mary K. or Simon B. Buckner by reason of any of the matters in said cross-bill set forth; and your orator shows that none of such matters of equity and limitation favoring your orator was disclosed by the pleadings or testimony or proven or averred or brought to the notice of the said State court in any manner, and your orator has never had the benefit or avail of such matters.

And your orator shows that the said Simon B. and Mary K. Buckner, in manner and form as aforesaid, and by means of illegal and incompetent testimony, and by the irregular and fraudulent practices hereinbefore detailed, have obtained a decree in this court purporting to divest your orator of his inheritance, and have seized upon one-half of the estate of your orator and appropriated it to their own use and benefit, and the said Simon B. Buckner is now in its enjoyment, and they do claim and pretend that by reason of such decrees, conveyances, partition, and judicial proceedings they have acquired a good and indefeasible title in and to the property once vested in your orator, and have full authority to encumber, convey, and enjoy the same, and that your orator is concluded by such judicial action and has no equity or title in and to said premises.

Whereas your orator claims unto your honors that the said court had no jurisdiction to decree said matters or any of them as
46 against your orator, and that even if such court did have jurisdiction that such decrees, conveyances, and partition were obtained by fraud and irregular and undue practice on the part of said Simon B. and Mary K. Buckner and the consent of said Beckwith, and that in equity your orator should not be bound thereby, but is entitled to be heard as against said decree and show error therein and to be restored to his rights in said property and to have

said Buckners enjoined from setting up said fraudulent title against him, and that they should be compelled to reconvey the property now in his possession, the title to which has been procured by their illegal and fraudulent practices as aforesaid.

And your orator shows that in Oct., 1871, all the original papers and records in said suit were destroyed by fire, and that neither he nor his guardian or relatives having his interests in charge had any knowledge of the erroneous and fraudulent proceedings aforesaid while the same were being hurried through the said circuit and supreme courts, and had no opportunity to prevent such errors or frauds or bring the rights of your orator to the notice of either said courts, by rehearing or otherwise, and your orator did not make discovery of any of said errors or frauds until long after the decree of the said supreme court and the rendition of said decree of Nov., 1871, and the execution of said master's deed and the partition proceedings aforesaid, and too late, according to the ordinary course of equity practice, to obtain any relief in the said proceedings, by appeal or otherwise.

And your orator further shows unto your honors that the said Simon B. and Mary K. Buckner are non-residents of the State of Illinois, and, exclusive of the real estate of your orator which they have procured by reason of the judicial proceedings aforesaid,
47 are possessed of no property in the said State, and have no means or estate sufficient in value to enable them to respond unto your orator for the rents or income derived by them pending this litigation from that portion of your orator's estate in their hands as aforesaid.

And your orator further shows that the said Simon B. Buckner, being in possession of such of your orators's estate as aforesaid, has been encumbering the same by mortgages and trust deeds and executing leases therefor, the particulars of which your orator is not advised, and also, as your is advised and charges, has sold and conveyed a portion thereof; and your orator charges that unless restrained by injunction issued out of this court that the said Buckners will continue to burden the estate of your orator and cloud the title thereof by such encumbrances, leases, and alienations so that your orator's estate will be put into peril and its value greatly diminished, to the great damage of your orator.

All which actings and doings of the said Mary K. Buckner and Simon B. Buckner and Corydon Beckwith are contrary to equity and good conscience and tend to the manifest wrong, injury, and oppression of your orator. In consideration whereof, and forasmuch as your orator is without remedy at and by the strict rules of the common law and can only be relieved in a court of equity, where such matters are properly cognizable—

Your orator prays that process may issue under the seal of this court directing and requiring the said Simon B. Buckner, Mary K. Buckner, and Jane C. Kingsbury, Ambrose E. Burnside, John J. B. Kingsbury, and Corydon Beckwith to appear as defendants unto this bill of complaint and to answer the same, but not upon oath, an oath to their said answers being hereby expressly waived under the statute.

48 And your orator prays that upon the final hearing hereof the said judicial proceedings by virtue of which the said Simon B. Buckner and Mary K. Buckner claim title to and enjoy the possession of your orator's estate as aforesaid shall be declared to have been procured and brought about by the illegal and erroneous and fraudulent practices of the said respondents, and that the said judicial proceedings declared to be utterly fraudulent and of no effect as against your orator, and that the said estate of your orator in the custody of the said Buckners, by reason of such judicial proceedings, shall be restored to your orator and the said Simon B. Buckner and Mary K. Buckner treated as trustees *ex malificio* of your orator and be compelled to yield up the possession of the property seized upon by them and execute proper releases to your orator and account to your orator for the income and issues therefrom, and that the said Simon B. and Mary K. Buckner and all claiming under them shall be perpetually enjoined and restrained from setting up any title to said property or interfering with the same in any manner under color of such judicial proceedings as aforesaid.

And your orator further prays that pending the litigation a temporary injunction shall be forthwith granted restraining the said Simon B. and Mary K. Buckner from in any manner encumbering, leasing, or disposing of the property so procured by them as aforesaid or any part thereof, and that your honors may also appoint a receiver of the said property of your orator so seized upon in fraud of his rights, with authority to collect the income thereof and hold the same under the order of the court and for the benefit of your orator until such time as a final decree can be enrolled declaring the rights and equities of your orator and restoring his said property unto him.

49 And your orator further prays when the particulars of the said encumbrances, leases, and alienations executed and contrived by the said Simon B. Buckner and Mary K. Buckner are disclosed that he may make parties hereto all the persons or corporations holding or claiming under such encumbrances, leases, and conveyances, and compel them to answer the matters in this bill of complaint alleged, and that on the final hearing all such encumbrances, leases, and conveyances so executed by the said Simon B. Buckner and Mary K. Buckner or either of them may be vacated, annulled, and set aside as of no valid force and effect against your orator and as being taken, executed, and received in fraud of the rights of your orator and with full notice thereof, and that all such encumbrancers, lessees, and grantees and their agents and attorneys and all claiming under such encumbrancers, lesses, and grantees shall be enjoined from setting up such encumbrances, leases, or conveyances as against you orator or in any manner interfering with the property or any part thereof by reason of their pretended claims.

And your orator prays that the court may grant unto him all such further and other relief as shall be just and equitable and

necessary to protect the estate and equity of your orator by reason of the premises.

HENRY W. KINGSBURY.
EVA LAWRENCE,
Guardian & Next Friend.

HENRY CRAWFORD, *Solicitor.*
LYMAN TRUMBULL, *Counsel.*

STATE OF ILLINOIS, } ss:
Cook County, }

Eva Lawrence upon oath says that she is the guardian
50 of Henry W. Kingsbury and his next friend in the foregoing bill of complaint; that she has read the said bill and knows the contents thereof, and that the same are true except as to those matters stated on information and belief, and as to those matters she verily believes the same to be true.

EVA LAWRENCE.

Signed and sworn to before me this 5th day of August, 1873.
[NOTARIAL SEAL.] OTTO VON FRITSCH,
Notary Public.

51 STATE OF ILLINOIS, } ss:
Cook County, }

Circuit Court. In Chancery.

HENRY W. KINGSBURY, by His Next Friend, CORYDON BECKWITH,
vs.
AMBROSE E. BURNSIDE *et al.* } Bill.

MARY K. BUCKNER *et al.*
vs.
HENRY W. KINGSBURY *et al.* } Cross-Bill.

Messrs. Beckwith, Ayer & Kales, solicitors for complainant in original bill and defendants in cross-bill.

GENTLEMEN: You are hereby notified that we shall, on
52 Saturday, the 4th day of November, A. D. 1871, at the going in of said court in the forenoon, or as soon thereafter as counsel can be heard, apply to the said court for leave to file the annexed record in place of and as a substitute for the record and papers in said causes lately destroyed by fire.

November 3rd, 1871.

GOUDY & CHANDLER,
Solicitors for Complainants in said Cross-Bill, etc.

We accept service of the within notice this 3rd day of November, A. D. 1871.

BECKWITH, AYER & KALES.

To Corydon Beckwith, Esq., next friend and guardian *ad litem* of Henry W. Kingsbury, minor.

SIR: You are hereby notified that we shall, on Saturday, the 4th day of October, A. D. 1871, at the going in of said court in the forenoon, or as soon thereafter as counsel can be heard, apply to the circuit court of Cook county for leave to file the annexed record in place of and as a substitute for the record and papers in said causes lately destroyed by fire.

November 3rd, 1871.

GOUDY & CHANDLER,
Solicitor for Complainants in Cross-Bill.

53 I hereby accept service of the foregoing notice this 3rd day of November, A. D. 1871.

C. BECKWITH.

UNITED STATES OF AMERICA, } ss:
State of Illinois, County of Cook, }

Pleas before the honorable the judges of the Cook county judicial circuit of the State of Illinois, at a term of the circuit court of Cook county begun and held at the court-house, in the city of Chicago, in said county, on the third Monday (being the nineteenth day) of December, in the year of our Lord one thousand eight hundred and seventy, and of the Independence of the said United States the ninety-fifth.

Present: Honorable Erastus S. Williams, chief justice of the circuit court of Cook county, in the State of Illinois; W. W. Farwell, Henry Booth, John G. Rogers, judges; Charles H. Reed, State's attorney; Timothy M. Bradley, sheriff of Cook county.

Attest: NORMAN T. GASSETTE, *Clerk.*

Be it remembered that heretofore, to wit, at the June term, to wit, on the 18th day of July, A. D. 1870, Henry W. Kingsbury, by Beckwith, Ayer & Kales, his solicitors, filed in said court his cer-
54 tain bill in words and figures following, to wit:

To the honorable judge of the circuit court of the county of Cook, in the State of Illinois, sitting in equity:

Humbly complaining, showeth unto your honor your orator, Henry W. Kingsbury, of Newport, in the State of Rhode Island, an infant under the age of twenty-one years, to wit, of the age of seven years and seven months or thereabouts, by Corydon Beckwith, his next friend—

That on or about the 25th day of June, A. D. 1856, one Julius J. B. Kingsbury departed this life intestate, and was seized at the time of his death of the following-described real estate situate in the city of Chicago, county of Cook, and State of Illinois, to wit:

Lots numbered five (5) and six (6), in block thirty-five (35), in the original town of Chicago, and also all that part of the east half of the northwest quarter of section nine (9), in township thirty-nine

(39) north, of range fourteen (14) east, of the third principal meridian, which lies east of the north branch of the Chicago river and south of the center of Ontario street, excepting, however, a
55 small portion of the last-described tract of land which the said decedent had previously conveyed to Simon B. Buckner, the title to which portion remained in the said Buckner until on or about the 15th day of May, A. D. 1861, when the same was conveyed by the said Buckner and wife to Henry W. Kingsbury, the father of your orator, as hereinafter more particularly stated.

That the said Julius J. B. Kingsbury at his death left him surviving his widow, Jane C. Kingsbury, who is still living, and two children, Mary K. Buckner, the wife of said Simon B. Buckner, and Henry W. Kingsbury, the father of your orator, who were his only heirs-at-law.

That on or about the 15th day of May, A. D. 1861, the said Simon B. Buckner and Mary K. Buckner, his wife, by their deed of that date duly executed and acknowledged, granted, bargained, sold, and conveyed to the said Henry W. Kingsbury, the father of your orator, one undivided half of lots numbered five (5) and six (6), in block number thirty-five (35), in the original town of Chicago above described, and also all their right, title, and interest in and to the other tract of land above described, situate in the northwest quarter of section nine (9), township thirty-nine (39) north, of range fourteen (14) east, of the third principal meridian.

56 That afterwards, on or about the 4th day of December, A. D. 1861, the said Henry W. Kingsbury, the father of your orator, intermarried with Eva Taylor, he being at that time a citizen and resident of the State of Connecticut; that afterwards, on or about the 17th of September, A. D. 1862, the said Henry W. Kingsbury, father of your orator, was killed at the battle of Antietam, in the State of Maryland, he being at that time a citizen and resident of the State of Connecticut and colonel and commanding officer of a regiment of Connecticut volunteers engaged in the military service of the United States.

The said Henry W. Kingsbury at his death left him surviving his widow, Eva Kingsbury, the mother of your orator, who is still living; and afterwards, on the 16th day of December, A. D. 1862, there was born to him by his said widow a posthumous son, who is the complainant in this suit and the only heir-at-law.

That the said Henry D. Kingsbury, father of your orator, died instestor [intestate] and seized in fee simple of all real estate hereinbefore described, and your orator now holds all the said real estate by inheritance from his said father, subject to the dower estates of his said mother and of the said Jane C. Kingsbury therein,
57 and also subject to certain incumbrances still outstanding against the said property or some portions thereof.

Your orator further shows unto your honor that the said Eva Kingsbury, mother of your orator, afterwards, on the 26th day of September, A. D. 1865, intermarried with one Albert G. Lawrence, and that she is now his wife.

Your orator further shows unto your honor that the said Jane C.

Kingsbury afterwards, to wit, on the 8th day of October, A. D. 1868, filed her bill of complaint in the circuit court of Cook county, in the State of Illinois, against the said Eva Lawrence, Albert G. Lawrence, your orator, and one David J. Lake, who assumed to act as guardian of your orator, therein setting forth that she, the said Jane C. Kingsbury, was entitled to dower in the premises before described, and praying that the same might be assigned to her, as by the said bill on file in this court will more fully appear, to which your orator refers and makes the same a part hereof, with the same advantage to himself as though the said bill were herein set forth at length.

That the said Eva Lawrence and Albert G. Lawrence afterwards, to wit, on the 9th day of October, A. D. 1868, filed their
58 cross-bill in the said court and in the cause against the said Jane C. Kingsbury, your orator, and the said David J. Lake, therein setting forth that the said Eva Lawrence was entitled to dower in the said premises above described, and praying that the same might be assigned to her, as by the said cross-bill on file in this court will more fully appear, to which reference is hereby made, with the same benefit to your orator as if the same were herein set forth at length.

Your orator further showeth unto your honor that afterwards, to wit, on the — day of ——, A. D. 1869, your orator, by his next friend, Evaline A. Taylor, filed his certain cross-bill in said cause against said Jane C. Kingsbury, Eva Lawrence, and Albert G. Lawrence and the said David J. Lake, praying, amongst other things, for the removal of the said David J. Lake from his said guardianship and for the appointment of a receiver of the income, rents, and profits of the said premises and to manage and lease the same, as by the said cross-bill filed in this court will more fully appear, to which reference is hereby made, and your orator prays the same benefit thereof as if the same were herein set out at length.

Your orator further showeth that afterwards such proceed-
59 ings were had in said cause and cross-causes that it was thereupon decreed and declared by the court that the said Jane C. Kingsbury was entitled to dower in said premises, and that by reason thereof she was entitled to one-third of the rents and profits of the same, less one-third of the interest upon certain mortgages in said decree mentioned, and that said Eva Lawrence was entitled to dower in two-thirds of said premises, by reason whereof she was entitled to $\frac{2}{3}$ths of the income of said premises, less two-ninths of the interest upon certain mortgages in said decree mentioned, and that your orator was entitled to the residue of the income of said premises after paying his proportion of the interest upon said mortgages, and that in and by said decree John Woodbridge, Esquire, was appointed receiver of the entire income of said premises accruing and to accrue, with power to lease and manage the same under the direction of the court, and with direction to pay out of said income to said Jane C. Kingsbury and Eva Lawrence the sums to which they were, respectively, entitled, and providing for your orator's support and maintenance, as well as for the payment of the interest upon said mortgages and other expenses incident to the care and management of said

property, as by the record and proceedings in said cause will more fully appear, and which your orator makes a part of this his
60 bill of complaint, and craves leave to refer thereto, with the same benefit to himself as if they were here set forth at length.

Your orator further showeth unto your honor that afterwards, to wit, on the day and year aforesaid, the said John Woodbridge accepted the office of and was duly qualified as such receiver as aforesaid, and then and there entered upon his duties as such receiver under and in pursuance of the decree of this court made as aforesaid, and that he hath from thence hitherto been and still is such receiver as aforesaid.

Your orator further showeth unto your honor that he is informed and believes the said Henry W. Kingsbury, the father of your orator, in his lifetime, to wit, on the 25th day of March, A. D. 1862, at Fortress Monroe, in the State of Virginia, wrote with his own hand and signed a paper, of which "Exhibit A," attached hereto, is a correct copy, and that he then and there delivered the same to John McLean Taylor, therein named, for safe-keeping.

And your orator further showeth in this behalf that his said father was not, at the time of the execution of said paper, an inhabitant or resident of said State of Virginia, and that he was not such
61 inhabitant or resident at any time thereafter nor at the time of his death, and that he had no property of any kind whatever in said State of Virginia at the time of his death nor for a long time prior thereto.

Your orator further showeth that he is advised and believes that afterward, on the 9th day of May, A. D. 1870, the said paper purporting to be the last will and testament of Henry W. Kingsbury, a copy whereof is hereto annexed as aforesaid, was presented to the corporation court of the city of Alexandria, in the State of Virginia, and such proceedings were thereupon had as that the said court ordered the said writing to be recorded as the true last will and testament of the said Henry W. Kingsbury, father of your orator, and that afterwards, on the 10th day of May, A. D. 1870, Ambrose E. Burnside, named in the said paper as one of the executors, assumed to qualify as such, as by a copy of the proceedings in the said court, hereunto annexed, will more fully appear, which are [is] made a part hereof and to which reference is made with the same benefit as though the same were herein set out at length.

Your orator further showeth that the said court in the State of Virginia has no jurisdiction to allow the probate of the said
62 will or the same to be recorded in manner and form as the same was done, and that such probate and record are utterly void & of no effect against your orator, & that neither your orator nor the said Jane C. Kingsbury, Eva Lawrence, Albert G. Lawrence, nor John McLean Taylor had any notice of the said application to and proceedings in the said court in the State of Virginia.

Your orator further showeth that afterwards, to wit, on the 11th day of July, A. D. 1870, the said Ambrose E. Burnside presented to the county court of Cook county, in the State of Illinois, a petition in writing setting forth that said Henry W. Kingsbury, father of

your orator, departed this life at Maryland, leaving a last will and testament duly signed in the State of Virginia, which has been duly proved in the said State, a certified copy of which he presented to said court for record, and praying that letters testamentary might be granted to him, the said Ambrose E. Burnside, as one of the executors of the said will.

Your orator further showeth that such proceedings were thereupon had that the said county court of Cook county, on the 11th day of July, 1870, ordered that the said paper and proof thereof be recorded in said court and that the same be treated and con-
63 sidered as good and available in law in like manner as a will executed in this State.

Your orator further showeth that the said proceeding in the said county court of Cook county was had without notice to your orator or to the said Jane C. Kingsbury, Eva Lawrence, A. G. Lawrence, or John McLean Taylor, and that such proceedings ought to be held and adjudged of no force and effect as to your orators' rights, but that such proceedings cloud the title and rights of your orator and will, unless restrained, seriously embarrass the administration of his property by the officers of this court.

Your orator further showeth unto your honor that after making of the said paper, called the last will and testament of the father of your orator, your orator was born, and that no provision was made in the said paper for your orator, and that it does not appear by said paper that it was the intention of your orator's father to disinherit your orator; and that by reason of these facts, even if the said paper was a valid will, your orator would be entitled to receive out of the estate of his father the same as if he had died intestate, and that, being the sole and only heir of his father, he inherited the
64 whole of his father's estate, subject to the dower of his mother and other encumbrances thereon.

Your orator further showeth that the said paper so produced as the last will and testament of the said Henry W. Kingsbury, the father of your orator, was not signed by him in the presence of any attesting witness nor was the same attested in the presence of the said Henry W. Kingsbury by any witness, and your orator alleges that the said writing was not executed with the requisite forms and solemnities to make the same good and available in law for the granting, conveying, and assuming the lands, tenements, hereditaments, moneys, goods, and chattels therein and thereby supposed to be given, granted, and bequeathed.

And your orator contests the validity of the said instrument and respectfully insists that the proceedings of the said county court of Cook county, hereinbefore referred to, ought to be reversed and set aside.

And your orator well hoped that no disputes would have arisen touching the rights of your orator in the premises. But now so it is, may it please your honor, that the said Ambrose E. Burnside, combining and confederating with the other defendants hereinafter named, or some of them, alleges and pretends that the
65 said instrument was executed with all the formalities required

by the laws of the State of Virginia relating to the execution of last wills and testaments, and that since the said instrument was written and signed by the said Henry W. Kingsbury, father of your orator, in that State, it is entitled to probate in the State of Illinois and is good and available in law in this State in like manner as wills made and executed there according to the forms and solemnities required by the laws of Illinois; whereas your orator charges the contrary and that the said Henry W. Kingsbury, deceased, was never a citizen of the State of Virginia nor was he ever domiciled in that State, but at the time of making and signing the said instrument he was and ever after continued to be during his life a citizen and resident of the State of Connecticut; that he did not die in the State of Virginia, and was seized of no estate, either real or personal, in that State at the time of death.

Your orator further charges that the said instrument is ineffectual to operate as a valid will according to the laws either of the place of his domicile or of the State of Maryland, where he died, or either of the States where any portion of his property, real or personal, was locally situate, for want of the requisite forms and solemnities
66 to give the same effect, and your orator respectfully submits that under the facts and circumstances aforesaid the instrument is not entitled to probate by the laws of this State.

Your orator further shows that Jane C. Kingsbury, Mary J. Buckner, wife of Simon B. Buckner; John J. D. Kingsbury, and Eva Lawrence, wife of Albert G. Lawrence, are named in the said instruments as devisees or legatees, and that they or some one or more of them claim thereunder some interest in the estate of your orator, whereas your orator charges that they have not nor has either of them acquired any interest in the said estate by virtue thereof; in consideration whereof and forasmuch as your orator is entirely remediless in the premises, according to the strict rule of the common law, and can only have adequate relief in a court of equity where matters of this kind are properly cognizable and relievable; to the end, therefore, that the said defendants may severally answer all and singular the matters hereinbefore stated and charged, but not under oath (the necessity of answering under oath being hereby expressly waived), and that the said instrument hereinbefore referred to, purporting to be the last will and testament of the said Henry W. Kingsbury, deceased, may be declared invalid and of no
67 legal force or effect as a last will and testament; that the proceedings of the county court of Cook county, hereinbefore referred to, admitting the said instrument to record and directing that the same be treated as good and available in law in like manner as wills executed in this State, may be reversed and set aside or declared to be null and void as constituting a cloud upon your orator's title to the real estate hereinbefore described; that your orator's right and title by inheritance to the estate hereinbefore mentioned as a posthumous son and only heir-at-law of the said Henry W. Kingsbury, deceased, may be confirmed and established, and that in the meantime the said Ambrose E. Burnside and certain of the other defendants hereinafter mentioned may be enjoined and restrained

from interfering or intermeddling with said estate claimed by your orator as aforesaid, or with the rents, issues, or profits thereof, and from attempting in any way to obstruct or interfere with the said John Woodbridge in the performance of his duties as receiver aforesaid, and that in the final hearing of this cause the said injunction may be made perpetual, and that your orator may have such other and further relief in the premises as the nature of his case may require and to your honor may seem meet—

68 May it please your honor to grant unto your orator not only the people's writ of injunction issuing out of and under the seal of this honorable court, to be directed to the said Ambrose E. Burnside, Mary J. Buckner, Simon B. Buckner, John J. D. Kingsbury, restraining them, their agents and attorneys, in the manner hereinbefore prayed, but also the people's writ of summons, to be directed to the said Ambrose E. Burnside, Jane C. Kingsbury, Mary J. Buckner, Simon B. Buckner, John J. D. Kingsbury, Eva Lawrence, and Albert G. Lawrence, thereby commanding them and every of them, at a certain day and under a certain pain therein to be specified, personally to be and appear before your honor in this honorable court, and then and there to answer all and singular the premises, and to stand to, perform, and abide such order and decree therein as to your honor shall seem meet; and your orator shall ever pray.

HENRY W. KINGSBURY,
By his next friend, C. BECKWITH.

BECKWITH, AYER & KALES,
Solicitors for Complainant.

69 STATE OF ILLINOIS, }
Cook County, } *ss:*

Corydon Beckwith, being duly sworn, says he is the next friend of the said Henry W. Kingsbury, a minor, the complainant named in the foregoing bill; that he has read the said bill of complaint and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

CORYDON BECKWITH.

Subscribed and sworn to before me this 6th day of July, A. D. 1870.

[SEAL.] JAMES S. MURRAY,
Notary Public.

In the County Court of Cook County.

STATE OF ILLINOIS, }
Cook County, } *ss:*

To the Honorable M. R. M. Wallace, judge of said court:

70 The petition of Ambrose E. Burnside respectfully showeth that he is a resident of Rhode Island; that on the — day of September, A. D. 1862, Henry W. Kingsbury departed this

life at Maryland, leaving a last will and testament, duly signed, as your petitioner believes, in the State of Virginia, and which has been duly proved in said State, a certified copy of which he now presents to your honor for record.

That the said testator in said will nominated your petitioner as one of the executors thereof; that the said deceased left property and effects as follows:

An interest in a large amount of real estate in the county of Cook and State of Illinois.

That the value of the whole estate of said deceased does not exceed — dollars; that the said deceased left an infant son, Henry W. Kingsbury, his only heir-at-law.

Wherefore your petitioner prays that the said will may be admitted to record according to the laws of the State of Illinois, and that all orders necessary may be made.

AMBROSE E. BURNSIDE,
By GOUDY & CHANDLER,
His Attorneys.

71 STATE OF ILLINOIS, } ss:
Cook County, }

William C. Goudy, being duly sworn, says that the foregoing petition is true.

W. C. GOUDY.

Sworn to and subscribed before me, John G. Gindele, clerk of the county court of Cook county, this 11th day of June, A. D. 1870.

JOHN G. GINDELE.

Filed July 11th, 1870.

JOHN G. GINDELE, *Clerk.*

72 Expecting soon to start upon a military expedition where death may overtake me, I leave this as a record of my wishes respecting the disposition of my property:

To my mother, Jane C. Kingsbury, I leave twenty thousand dollars, or so much of my Chicago property as upon fair appraisal may be valued at that amount.

To my sister, Mary J. Buckner, I leave as much of the Chicago property held in my name as shall amount to one-third of the property in the city of Chicago, Illinois, held by my father, Julius J. B. Kingsbury, deceased.

To my cousin, John J. D. Kingsbury, I leave my property at Waterbury, Conn., and in addition thereto five thousand dollars. I trust he will expend it in completing his education.

The remainder of my property of every description I leave to my devoted wife, Eva. I desire, moreover, that the provisions of this will be so carried out that the yearly income of my wife for her own personal support shall never be less than two thousand dollars.

As executors I name Ambrose E. Burnside, of Rhode Island, and Capt. John Taylor, commissary department, U. S. Army.

73 Signed at Fortress Monroe, Va., March 25th, 1862.

HENRY W. KINGSBURY,
First Lieutenant 5th Regiment Artillery, U. S. Army.

STATE OF VIRGINIA, }
Corporation Court of the City of Alexandria, } *ss:*

A writing purporting to be the last will and testament of Henry W. Kingsbury was produced in court by C. W. Wattles, and, there being no subscribing witness thereto, S. B. Buckner and Charles H. Hatch were sworn, and deposed that they are well acquainted with the testator's handwriting and verily believe the said writing and the name thereto subscribed to be wholly written by the testator's own hand; whereupon the said writing is ordered to be recorded as the true last will and testament of the said Henry W. Kingsbury, deceased; and at a corporation court for the city of Alexandria, continued and held on the 10th day of May, 1870, Ambrose E. Burnside, one of the executors named in the last will and testament of Henry W. Kingsbury, deceased, on motion of C. W. Wattles, has leave to qualify; whereupon he executed his bond, with James M. Stewart his security, in the penalty of five hundred dollars, conditioned according to law.

74 STATE OF VIRGINIA, }
Corporation Court of the City of Alexandria, } *ss:*

I, Morton Marye, clerk of the corporation court of the city of Alexandria, in the State of Virginia, do hereby certify that the foregoing is a true and complete copy of the last will and testament of Henry W. Kingsbury, deceased, and of the proof thereof before said court, as the same appears of record in my office; and I further certify that the said will was duly executed and proved agreeably to the laws and usages of the State of Virginia, in which the same purports to have been executed.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court this 5th day of July, 1870.

[SEAL.] MORTON MARYE, *Clerk.*

STATE OF VIRGINIA, }
Alexandria City, } *ss:*

I, Enoch M. Lowe, only judge of the corporation court of the city of Alexandria, in the State of Virginia, do hereby certify that Morton Marye, who hath given the preceding certificate, is clerk of said court, and that his attestation is in due form.

75 Given under my hand this 5th day of July, A. D. 1870.

E. M. LOWE,
Judge of the Corporation Court of the City of Alexandria.

Filed July 11th, 1870.

In the Matter of the Estate of HENRY W. KINGSBURY.

And now comes Ambrose E. Burnside, one of the executors named in the will herein mentioned, by his attorneys, Goudy & Chandler, and presents a copy of the last will and testament of Henry W. Kingsbury, deceased, and the proof thereof before the corporation court of the city of Alexandria, in the State of Virginia, with a certificate of the clerk of said court, with the seal of said court; that the same is a true and complete copy of the last will and testament of Henry W. Kingsbury, deceased, and of the proof thereof before said court, as the same appears of record in his office, and that the said will was duly executed and proved agreeably to the laws and usages of the State of Virginia, in which the same purports to have been executed, and with a certificate of the only judge of said court to the official character of said clerk, and that the attestation
76 is in due form, and moves the court to admit the same to record.

And it appearing to this court that the last will and testament of Henry W. Kingsbury, deceased, was executed and proved agreeably to the laws and usages of the State of Virginia, in which the same was executed, and that the copy of said will and the probate thereof is duly certified according to the laws of the State of Illinois, and that said will touches and concerns real estate and other property in the State of Illinois—

It is by the court ordered that the said will and proof thereof, certified as aforesaid, be recorded, and that the same be treated and considered as good and available in law in like manner as wills executed in this State.

M. R. M. WALLACE.

Entered July 11, 1870.

Let the injunction issue in accordance with the prayer of the foregoing bill upon complainant filing an injunction bond, conditioned according to law, in the penal sum of five thousand dollars, with such surety or sureties thereon as may be approved by the clerk of this court.

E. S. WILLIAMS,
77 *Judge of 7th Judicial Court, Ills.*

And afterwards, to wit, on the 31st day of October, A. D. 1870, Mary K. Buckner and Simon B. Buckner, by Goudy & Chandler, their solicitors, filed in said court their certain joint & several answer in the words and figures following, to wit:

STATE OF ILLINOIS, } ss :
Cook County, }

Circuit Court. October Term, 1870.

HENRY W. KINGSBURY } In Chancery.
vs.
AMBROSE E. BURNSIDE *et al.*

The joint & several answer of Mary K. Buckner and Simon B. Buckner to the bill of complaint of Henry W. Kinsbury, a minor, who sues by his next friend, Corydon Beckwith, against Ambrose E. Burnside, Jane C. Kingsbury, Mary J. Buckner, Simon B. Buckner, John J. D. Kingsbury, Eva Lawrence, and Albert G. Lawrence.

These respondents, saving and reserving to themselves all benefit of exception to the many errors, uncertainties, and manifest insufficiencies in the said bill of complaint contained, protesting
78 that the same and the matters and things therein contained are not sufficient to require any answer thereto, and praying the same advantage on the final hearing hereof as if they severally demurred to the said bill of complaint, for answer thereunto, or to so much thereof as they are advised is necessary or material to be answered unto by these respondents, they admit that on or about the 26th day of June, A. D. 1856, Julius J. B. Kingsbury died intestate and seized in fee simple, subject to certain incumbrances, of *of* real estate situated in the city of Chicago, county of Cook, and State of Illinois, to wit:

Lots numbered five and six, in block thirty-five, in the original town of Chicago, and also all that part of the east half of the northwest quarter of section nine, in township thirty-nine north, of range fourteen east, of the third principal meridian, which lies east of the north branch of Chicago river and south of the center of Ontario street; and they aver that although a small part thereof had been conveyed to the respondent, Simon B. Buckner, by the said Julius J. B. Kingsbury in his lifetime, yet the conveyance was without consideration and did not confer any beneficial interest to the grantee, but said property was actually owned by said Kingsbury at his death; and they aver that the said Julius J. B. Kings-
79 bury died seized of a large tract of land in the east half of the northwest quarter of section nine aforesaid than that described in the bill of complaint, and the same is fully described in a deed, dated May 30th, 1833, executed by James Kinzie and wife to said Kingsbury.

And they admit that the said Julius J. B. Kingsbury left surviving him Jane C. Kingsbury, his widow, and two children—the respondent, Mary K. Buckner, and Henry W. Kingsbury, now deceased; and these respondents aver that the title to said real estate, as the same was vested in the said Julius J. B. Kingsbury, descended to and vested in the respondent, Mary K. Buckner, and the said Henry W. Kingsbury, subject to the right of dower therein of the widow, Jane C. Kingsbury, and the respondent, Mary K. Buckner,

being then the wife of the respondent, Simon B. Buckner, and, there being issue living born of such marriage in the year 1858, an invitiate estate as tenant, by the courtesy to an undivided half of said real estate, subject to such dower estate, also vested in the said Simon B. Buckner.

And these respondents, further answering the said bill of complaint, aver that at the time of the death of the said Julius J. B. Kingsbury the said Henry W. Kingsbury was a minor, and the respondent, Simon B. Buckner, had the control and management
80 of said property until it was placed in the hands of Ambrose E. Burnside, as hereafter stated; and these respondents, further answering the bill of complaint, admit that a deed, dated May 15, 1861, signed, sealed, and acknowledged, as appears therefrom, purporting to convey to the said Henry W. Kingsbury, now deceased, an undivided half of the real estate hereinbefore described, was signed and acknowledged in the manner shown by said deed, and they attach hereto a copy thereof, marked "Exhibit 1," as a part of this answer, but they expressly deny that they granted, bargained, sold, and conveyed the title to said real estate as alleged in the bill of complaint; but, on the contrary, the respondent, Mary K. Buckner, is advised that said indenture was not acknowledged according to the laws of the State of Illinois in such a manner as to pass her title to said property to the grantee, and therefore she avers that said deed or indenture is null and void as to her; and these respondents say that said deed or indenture was prepared, signed, and acknowledged on the day of its date in the city of Louisville, in the State of Kentucky, where they then resided; that the said Henry W. Kingsbury was not present at the time and had no information or knowledge whatever that such instrument of writing was
81 to be made or was being made, and such deed was then sent by the respondent, Simon B. Buckner, to his agent in Chicago, with directions to file the same for record, which was done on the 17th day of May, 1861, which was the only delivery of such deed ever made to the said Henry W. Kingsbury; and these respondents aver that the said Henry W. Kingsbury had no information or knowledge whatever that any such deed or indenture had been made for two months thereafter; and they further aver that the same was so made as aforesaid without any consideration, contract, bargain, or promise whatever; and these respondents aver that, while the said Henry W. Kingsbury was ignorant as aforesaid in regard to said transaction, the sole purpose of the respondents in making said deed was to vest in the said Henry W. Kingsbury the legal title to the property described in such deed or indenture, to hold the same in trust and not to create in him any beneficial interest whatever. These respondents, having full confidence in the affection and integrity of the said Henry W. Kingsbury, voluntarily made such deed in the manner aforesaid, believing that he would not claim the rents and profits and would convey or reconvey the premises on request.

And the respondent, Simon B. Buckner, for himself, say-
82 that it was his own desire and purpose to waive any interest

or claim in said property for the benefit of his wife in order that he might have and enjoy all the property descendant from her father and that the control of the same might be placed in her own family, and while he now claims his rights in equity and under the law it is still with the desire and purpose to effectually divest himself in some legal and appropriate manner of all claim to such property, and he thereby offers to submit to any decree the court may deem proper to make to that end.

And these respondents aver that the said Henry W. Kingsbury frequently, after he was informed of the facts and at all times during his lifetime, admitted that he held the title to said property described in the deed of May 15th, 1861, in trust, and that he had no right or ownership for himself whatever, and that he at some time expressed an intention to declare said trust in his will or reconvey the same; and these respondents express their confident belief that the said Henry W. Kingsbury would always have recognized the equitable and just claim of these respondents, and that if he had lived this controversy would never have arisen.

83 And these respondents aver that some — in the month of December, 1859, Henry W. Kingsbury and these respondents made an arrangement with Ambrose E. Burnside to take charge of said property as an agent for them and Mrs. Jane C. Kingsbury, because the respondent, Simon B. Buckner, resided at Louisville, Kentucky, and Henry W. Kingsbury was then a cadet at West Point, while said Burnside resided at Chicago, with the understanding that the said Burnside should receive directions from said Buckner.

And these respondents aver that the said Henry W. Kingsbury during his lifetime made no claim to the rents and profits of such real estate described in the deed of May 15, 1861, but the same were received and controlled as before such deed was made by said agent, Ambrose E. Burnside, acting for Mrs. Jane C. Kingsbury, Henry W. Kingsbury, and these respondents, and were applied for the benefit of all of them in the same manner as if no such deed had been made and no possession was ever taken or entry made under said deed by the said Henry W. Kingsbury or any other person.

And these respondents, further answering the said bill of complaint, say that on the 25th day of March, 1862, at Fortress

84 Monroe, in the State of Virginia, the said Henry W. Kingsbury, who was first lieutenant in the 5th regiment of artillery in the United States Army and in the military service, and engaged in the civil war then existing, wrote with his own hand and signed his last will and testament as follows, to wit:

Expecting soon to start upon a military expedition where death may overtake me, I leave this as a record of my wishes respecting the disposition of my property.

To my mother, Jane C. Kingsbury, I leave twenty thousand dollars, or so much of my Chicago property as upon a fair appraisal may be valued at that amount.

To my sister, Mary J. Buckner, I leave so much of the Chicago property held in my name as shall amount to one-third of the prop-

erty in the city of Chicago, Ill., left by my father, Julius J. B. Kingsbury, deceased.

To my cousin, John J. B. Kingsbury, I leave my property in Waterbury, Connecticut, and, in addition thereto, five thousand dollars, which I trust he will expend in completing his education.

85 The remainder of my property I leave to my devoted wife, Eva. I desire, moreover, that the provisions of this will may be so carried out that the yearly income of my wife for her own personal support shall never be less than two thousand dollars ($2,000).

As executors I name Gen. Ambrose E. Burnside, of Rhode Island, and Capt. John Taylor, commissary department, U. S. Army.

Signed at Fortress Monroe, Va., March 25th, 1862.

HENRY W. KINGSBURY,
First Lieutenant 5th Regiment Artillery, U. S. Army.

And these respondents aver that the only property in Chicago vested in the said Henry W. Kingsbury at the time of making said will or at any other time was the real estate which the said Julius J. B. Kingsbury left at his death, and which descended to the said Henry W. Kingsbury and the respondent, Mary K. Buckner, subject to the right of dower of Jane C. Kingsbury; and they also aver that the only transfer, grant, conveyance, or devise of property in Chicago ever made to the said Henry W. Kingsbury was

86 made by the said deed or indenture of the 15th day of May, 1861, hereinbefore described, and therefore they aver that the only Chicago property ever held in the name of said Henry W. Kingsbury for the use of any person was the property described in the deed of May 15th, 1861, so held as aforesaid in trust.

And these respondents, further answering the bill of complaint, admit that the said Henry W. Kingsbury, at the time mentioned in the bill, intermarried with Eva Taylor, and that he was killed at the battle of Antietam, at the time named in the bill, and left surviving him his widow, Eva, and that after his death a posthumous son was born, as stated in the bill, who became the heir-at-law and is the complainant in this suit.

And these respondents admit that said Henry W. Kingsbury died seized of an undivided half of the real estate hereinbefore described as descended from the said Julius J. B. Kingsbury, *subject to the right of dower of the said Julius J. B. Kingsbury*, subject to the right of dower of the said Jane C. Kingsbury and the certain incumbrances thereon, but they deny that he was the real owner of more

87 than an undivided half thereof, and they deny that he died intestate.

And these respondents admit that the said Eva Kingsbury married Albert G. Lawrence at the time stated in the bill, and that she is now his wife.

And these respondents, further answering the bill of complaint, admit that on the 8th day of October, 1868, the said Jane C. Kingsbury filed her bill in chancery in the circuit court of Cook county, in the State of Illinois, against the complainant-, Eva Lawrence,

Albert G. Lawrence, David J. Lake, guardian of the complainant, praying for an assignment of dower in the premises hereinbefore described; that on the 9th day of October, 1868, the said Eva Lawrence and Albert G. Lawrence filed a cross-bill in said cause against Jane C. Kingsbury, the complainant, and David J. Lake, guardian of the complainant, praying for the assignment of dower in said premises, and that afterwards a cross-bill in the name of the complainant, by next friend, Evaline A. Taylor, was filed in said cause against the said Jane C. Kingsbury, Eva Lawrence, Albert G. Lawrence, and David J. Lake, praying for the removal of the said David J. Lake from the guardianship and for the appointment of a receiver to lease said premises and receive the rents and profits, etc.; but
88 they make no admission as to the contents of said bills, and ask that the same be produced in evidence upon the final hearing of this cause; and these respondents admit that John Woodbridge was appointed receiver according to the prayer of said last-named cross-bill, but otherwise they neither admit nor deny the statements of the bill of complaint in regard to the proceedings in said causes, and they ask that proof be required thereof by the production of the records therein.

And these respondents, further answering the bill of complaint, admit that on the 25th day of March, 1862, the said Henry W. Kingsbury, father of the complainant, and in his lifetime, at Fortress Monroe, in the State of Virginia, wrote with his own hand and signed a paper, of which "Exhibit A," attached to the bill, is a true copy, and that he left the same at some place or with some person to these respondents unknown; and they deny the statement that the father of the complainant was not, at the time of the execution of said paper an inhabitant or resident of the State of Virginia, and that he was not such resident or inhabitant thereafter; and they also deny the statement of the bill that he had no property of any kind in the State of Virginia at the time of his death nor for a
89 long time prior thereto; but, on the contrary, they aver that the said Henry W. Kingsbury was an inhabitant of the State of Virginia, and that he had property and estate in said State at the time said paper was proven as the last will and testament of the said Henry W. Kingsbury in the State of Virginia.

And these respondents admit that on the 9th day of May, 1870, the said paper, a copy of which is given in "Exhibit A," was presented to the corporation court of the city of Alexandria, in the State of Virginia, and such proceedings were thereupon had that the said court ordered that the said writing be recorded as the last will and testament of the said Henry W. Kingsbury, and that the respondent, Ambrose E. Burnside, named as one of the executors, duly qualified as an executor; and they aver that said paper writing was the last will and testament of the said Henry W. Kingsbury, that the said court had jurisdiction of such proceedings before it, and that the order and judgment of said court are conclusive of the question decided by it, and that thereby the said last will and testament was admitted to probate, so that the same cannot be questioned in this or any other court.

90 And these respondents admit that on the 11th day of July, 1870, the defendant, Ambrose E. Burnside, presented a petition to the county court of Cook county, in the State of Illinois, together with a duly certified copy of said last will and testament of Henry W. Kingsbury, deceased, and the probate thereof, as required by the statute of the State of Illinois in such cases made and provided, and such proceedings were thereupon had that an order was entered admitting the same to record in the said court, as will more fully appear by the certified copy thereof which will be produced on the final hearing of this cause.

And these respondents aver that within twenty days after the entry of such order the complainant prayed an appeal from said order to the circuit court of Cook county, Illinois, and the same was allowed, and such appeal is now pending and undetermined in this court.

And these respondents admit that the complainant was born after the death of his father, and that there is no provision in said will for him, and they aver that by the laws of the State of Virginia, where such will was made and proven, said posthumous birth did not revoke said will or any part thereof, but required the will
91 to be so construed that it should read as if the devises and bequests therein had been limited to take effect in the event that the child shall die under the age of twenty-one years unmarried and without issue; and, as to the effect of such posthumous birth on the title to the real estate in Illinois, these respondents are advised that the same is a question of law arising on the admitted facts, and they submit the same to the decision of the court; but these respondents hope and believe that the judgment of the court will give to the complainant all of such real estate in Illinois that justly belonged to his father as if he had died intestate.

And these respondents deny that said will was not executed with the forms and solemnities to make the same good and available in law for granting and conveying lands, tenements, hereditaments, moneys, goods, and chattels, as stated in said bill of complaint; but, on the contrary, they aver that the same was written, executed, published, and proved in all respects according to the laws of the State of Virginia, where the same was made and proved and where the testator had estate, and that the corporation court of the city of Alexandria, in the said State of Virginia, had full jurisdiction to decide the question as to the validity of such will and admit
92 the same to probate, as was in fact done, and, according to the provisions of the statute in Illinois, the same being certified as required by said statute and recorded in the county of Cook aforesaid, became good and available in law in like manner as wills made and executed in the State of Illinois.

And these respondents, further answering the bill of complaint, deny that the said Henry W. Kingsbury, now deceased, was a citizen, resident, or inhabitant of the State of Connecticut, as alleged in the bill; but they aver that Julius J. B. Kingsbury, the father of Henry W. Kingsbury, was, at the time the latter was born and for a long time prior thereto, an officer in the United States Army, and

had no fixed residence or place of abode; that he, the said Henry W. Kingsbury, was appointed in his boyhood a cadet at West Point and credited to the congressional district embracing Brooklyn, New York; that he passed through the regular course at that institution and was appointed a lieutenant in the United States Army, and entered upon active service and continued in the same until his death; and these respondents claim that the said Henry W. Kingsbury never acquired a residence or citizenship, within the meaning of the law, in any particular State, although he was a citizen of the
93 United States and in its service and an inhabitant of such places as he happened to be ordered to in the discharge of his official duties.

And these respondents deny all fraud and combination charged in the bill.

And these respondents deny all statements of the bill of complaint necessary and material to be answered by them which are not herein confessed or avoided.

And now, having fully answered the said bill of complaint, these repondents severally pray to be hence dismissed with their reasonable costs in this behalf sustained, etc.

S. B. BUCKNER.
MARY K. BUCKNER.

GOUDY & CHANDLER,
Solicitors for said Respondents.

EXHIBIT 1.

Be it known that Simon B. Buckner & Mary K. Buckner, his wife, of the city of Louisville and State of Kentucky, in consideration of the sum of one dollar and the mutual love and affection we bear to our brother, Henry W. Kingsbury, do hereby grant, bargain, sell, and convey to said Henry W. Kingsbury, of the United
94 States Army, his heirs and assigns forever, the following property, viz:

One undivided half of lots numbered five (5) and six (6), in block number thirty-five (35), in the original town of Chicago, in the county of Cook and State of Illinois, and also all our right, title, and interest in the Kingsbury tract, so called, being the tract of thirty-five acres, more or less, purchased from James Kinzie by the late Major Julius J. B. Kingsbury, of the United States Army, as per deed of said Kinzie on record in the clerk's office of Cook county, Illinois, the said tract being the south half of what remains of the northwest quarter of section nine (9), in township thirty-nine, range fourteen, in said Cook county, Illinois, after deducting therefrom the town of Waubansia. The other interest in said land and tenements, etc., included in this deed now belongs to said Henry W. Kingsbury as one of the heirs of the late Major J. J. Kingsbury, and the entire property being subject to the dower interest of Mrs. Jane C. Kingsbury:

To have and to hold the same to the said grantee, his heirs and

assigns forever, the grantor covenanting that — will warrant the property hereby conveyed.

95 In witness whereof we have hereunto set our hands and seals, at Louisville, this fifteenth day of May, 1861.

SIMON B. BUCKNER. [SEAL.]
MARY K. BUCKNER. [SEAL.]

STATE OF KENTUCKY, }
County of Jefferson, } *set:*

Be it remembered that on this fifteenth day of May, A. D. 1861, before me, C. S. Thomasson, a notary public in and for said county and State, duly commissioned and qualified, personally appeared Simon B. Buckner and Mary K. Buckner, his wife, who are personally known to me to be the persons whose names are subscribed to the foregoing deed as having executed the same for the uses and purposes therein expressed.

And the said Mary K. Buckner, wife of the said Simon B. Buckner, being of lawful age, and having been by me examined separate and apart from her said husband, and the contents of the said deed fully made known and explained to her, acknowledged that she had — the same (and relinquished her dower in the lands and tenements therein mentioned) voluntarily and without compulsion of her said husband.

96 In witness whereof I have hereunto set my hand and affixed my official seal this fifteenth day of May, A. D. 1861.

C. S. THOMASSON,
[L. S.] *Notary Public for Jefferson County, State of Kentucky.*

And afterwards, to wit, on the 22nd day of November, A. D. 1870, Jane C. Kingsbury, by Goudy and Chandler, her solicitors, filed in said court her separate answer in the words and figures following, to wit:

STATE OF ILLINOIS, }
Cook County. }

HENRY W. KINGSBURY, by His Next Friend, CORYDON BECKWITH,
vs.
AMBROSE E. BURNSIDE. } In Chancery.

October Term, Circuit Court, 1870.

The separate answer of Jane C. Kingsbury to the bill of complaint of Henry W. Kingsbury, by his next friend, Corydon Beckwith, against Ambrose E. Burnside, Jane C. Kingsbury, Mary J. Buckner, John J. D. Kingsbury, Eva Lawrence and Albert G. Lawrence.

97 The respondent, saving and reserving to himself all benefit of exception to the many uncertainties and the manifest insufficiencies in the said bill, protesting that the same and the mat-

ters and things therein stated are not sufficient to require any answer thereto, and praying the same advantage in the final hearing thereof as if she demurred to the said bill of complaint, for answer thereunto, or so much as she is advised it is necessary or material to be answered by her, she admits that on or about the 26th day of June, 1856, Julius J. B. Kingsbury died intestate and seized of the real estate described in the bill, leaving this respondent as his widow and two children, Mary K. Buckner, the wife of Simon B. Buckner, and Henry W. Kingsbury, who were his only heirs-at-law.

And this respondent admits that on the fifteenth day of May, 1861, the said Simon B. Buckner and Mary K. Buckner made a deed of that date purporting to grant, bargain, sell, and convey to Henry W. Kingsbury the property described in the bill; but this respondent, upon her information and belief, denies that in
98 and by said deed the said property was bargained and sold to the said Henry W. Kingsbury; but, upon the contrary, upon such information and belief, she avers that said conveyance was a deed of trust intended only to vest the said Henry W. Kingsbury with the legal title to said premises, to hold in trust for the use and benefit of his sister, Mary K. Buckner, and her children, and so far as said property was owned by Simon B. Buckner for his use and benefit.

And this respondent admits that on the 4th of December, 1861, the said Henry W. Kingsbury married Eva Taylor, and that on the 17th day of September, 1862, he was killed at the battle of Antietam, in the State of Maryland; that he left surviving him his widow, Eva, and afterwards, on the 16th day of December, 1862, there was born to him by his said widow a posthumous son, who was named Henry W. Kingsbury after his father, and who is the complainant in this suit; and she further admits that the said Eva Kingsbury married Albert G. Lawrence at the time mentioned in the bill of complaint.

And this respondent, further answering, admits that on the 8th day of October, 1868, she filed her bill of complaint in the circuit court of Cook county, in the State of Illinois, against the
99 said Eva Lawrence, Albert G. Lawrence, Henry W. Kingsbury, and David J. Lake, as set forth in the bill of complaint; that the said Eva Lawrence and Albert G. Lawrence, on the 9th day of October, 1868, filed their cross-bill in said court and in said cause against this respondent, Henry W. Kingsbury, and David J. Lake, as set forth in the bill of complaint; that on the — day of ——, 1869, the said Henry W. Kingsbury, by Evaline A. Taylor, as his next friend, filed a cross-bill in said cause against this respondent, Eva Lawrence, Albert G. Lawrence, and David J. Lake, as set forth in the bill of complaint; and this respondent admits that such proceedings were had that it was decreed by the court that this respondents was entitled to dower in the premises described in the bill, and that she was entitled to one-third of the rents and profits of the same, less one-third of the interest upon certain mortgages in that decree mentioned, and that Eva Lawrence was entitled to dower in two-thirds of said premises, and entitled to two-ninths of the income of

the premises, less two-ninths of the interest upon certain mortgages in the decree mentioned, and that the said Henry W. Kingsbury was entitled to the residue of the income after paying his portion of the interest upon the mortgages, and that in and by said de-
100 cree John Woodbridge was appointed receiver of the income of the premises, with power to rent and manage the property under the direction of the court, and with direction to pay out of said income to this respondent and Eva Lawrence the sums to which they were respectively entitled, and providing for the support and maintenance of the complainant, and she admits that the said John Woodbridge accepted the office of receiver, was duly qualified, and entered upon the discharge of his duties.

And this respondent, further answering, admits that Henry W. Kingsbury, her son, on the 25th day of March, 1862, at Fortress Monroe, in the State of Virginia, wrote with his own hand and signed a paper, of which "Exhibit A" at [attached] to his bill is a correct copy; and she further says, upon the advice of counsel, that such paper is and was the last will and testament of Henry W. Kingsbury, duly executed and valid according to the laws of the State of Virginia; and respondent also admits that on the 9th day of May, 1870, the said paper purporting to be the last will and testament of Henry W. Kingsbury, deceased, was presented to the corporation court of the city of Alexandria, of the State of Virginia, and the same was
101 by such court admitted to probate and ordered to be recorded as the true last will and testament of the said Henry W. Kingsbury, and on the 10th day of May, 1870, Ambrose E. Burnside, named as one of the executors of said will, qualified as such and entered upon the discharge of his duties.

And this respondent, further answering, denies the statement of the bill that said court in the State of Virginia had no jurisdiction to allow the probate of said will or the same to be recorded in manner and form as the same was done, and denies that the probate and record are void and of no effect, but she admits that neither she nor Eva Lawrence, nor Albert G. Lawrence, nor John McLean Taylor had no notice of the said application to and the proceedings in the said court in the State of Virginia.

And this respondent admits that on the 11th day of July, 1870, the said Ambrose E. Burnside presented to the county court of Cook county, in the State of Illinois, a petition, as set forth in the bill of complaint, and that an order was entered by said court, as alleged in the bill, and she also admits that such proceeding was had without notice to her, or to complainant, or to Eva Lawrence, or Albert G. Lawrence, or John McLean Taylor.

102 And this respondent, further answering said bill, denies that said will was invalid or is ineffectual or null and void, as alleged in the bill of complaint; but, as advised by counsel, she alleges that the said will was written and executed in the manner required by the laws of the State of Virginia, where the same was made and proven, and that said will has been duly admitted to probate in the manner prescribed by the laws of Virginia and by a court of competent jurisdiction and having jurisdiction of the pro-

ceeding in which such probate was made, and that a duly certified copy of the will and probate thereof, according to the laws of the State of Illinois, was presented to the county court of Cook county, in the State of Illinois, as stated in the bill of complaint, and thereby the said will became good and available in the State of Illinois in like manner as wills made and executed in that State and according to the laws of that State.

And this respondent avers that an appeal was taken by the complainant from the said order of the county court to this court, and the same is now pending and undetermined upon the law side of this court.

And as to all other matters and things in the said bill of complaint contained necessary and material to be answered unto
103 by this respondent, not herein confessed or avoided or denied, this respondent denies the same, as stated in the bill.

And now, having fully answered, the respondent prays to be dismissed hence with her reasonable costs in this behalf sustained, etc.

JANE C. KINGSBURY,
By GOUDY & CHANDLER,
Her Solicitors.

GOUDY & CHANDLER,
Sol'rs for said Def't, Jane C. Kingsbury.
JAMES E. MUNROE, *Of Counsel.*

And afterwards, to wit, on the 6th day of December, A. D. 1870, Ambrose E. Burnside and John J. D. Kingsbury, by Goudy & Chandler, their solicitors, filed in said court their certain joint and several answer in the words and figures following, to wit:

104 STATE OF ILLINOIS, } *ss:*
Cook County, }

Circuit Court of Cook County. November Term, 1870.

HENRY W. KINGSBURY, by His Next Friend, CORYDON BECKWITH,
vs.
AMBROSE E. BURNSIDE. } In Chancery.

The joint and several answer of Ambrose E. Burnside and John J. D. Kingsbury to the bill of complaint of Henry W. Kingsbury, a minor, who sues by his next friend, Corydon Beckwith, against Ambrose E. Burnside, Jane C. Kingsbury, Mary J. Buckner, Simon B. Buckner, John J. D. Kingsbury, Eva Lawrence, and Albert G. Lawrence.

These respondents, saving and reserving to themselves all benefit of exception to the many uncertainties and manifest insufficiencies in the said bill of complaint contained, protesting that the same and the matters and things therein contained are not sufficient to require

any answer thereunto by these defendants, and praying the same advantage on the final hearing thereof as if they severally demurred to the said bill of complaint, for answer thereunto, or so much thereof as they are advised is material or necessary *or material* to be answered unto by these respondents, they admit that on or about

105 the 26th day of June, A. D. 1856, Julius J. B. Kingsbury died intestate and seized in fee simple, subject to certain incumbrances, of real estate situate in the city of Chicago, county of Cook and State of Illinois, described as—

Lots numbered five (5) and six (6), in block thirty-five (35), in the original town of Chicago, and also a part of the east half (½) of the northwest quarter of section nine (9), in township thirty-nine (39) north, of range fourteen (14) east, of the third principal meridian, which lies east of the north branch of the Chicago river and north of Kinzie street, mentioned in the deed to the said Julius J. B. Kingsbury as containing about thirty-five (35) acres of land, and commonly known as the "Kingsbury tract."

And these respondents admit that the said Julius J. B. Kingsbury left surviving him Jane C. Kingsbury, his widow, and two children—Mary K. Buckner and Henry W. Kingsbury; and they aver that the title of the said real estate, as the same was vested in the said Julius J. B. Kingsbury, descended to and vested in the respondent, Mary K. Buckner, and the said Henry W. Kingsbury, subject to the right of dower of the widow, Jane C. Kingsbury, and Mary K. Buckner, being then the wife of the respondent, Simon B. Buckner, and, there being issue born of such marriage in the year 1858, an estate as tenant, by the courtesy, invitiate, to an undivided half of said real estate, subject to such dower estate, also vested in the said Simon B. Buckner.

106 And these respondents admit that on the 4th day of December, 1861, the said Henry W. Kingsbury, the father of the complainant, intermarried with Eva Taylor, and that on or about the 17th day of September, 1862, the said Henry W. Kingsbury was killed at the battle of Antietam, in the State of Maryland, and that at the time he was colonel in the volunteer service, commanding a regiment of Connecticut volunteers, engaged in the military service of the United States; that said Henry W. Kingsbury at his death left surviving him his widow, who is still living, and that afterwards, on the 16th day of December, 1863, there was born to him by his said widow a posthumous son, who is the complainant in this suit.

And these respondents, further answering the said bill of complaint, deny that the said Henry W. Kingsbury, the father of the complainant, died intestate and seized in fee simple as the absolute owner thereof of all the real estate described in the said bill of complaint.

And the respondents admit that the said Eva Kingsbury, on the 26th day of September, 1865, intermarried with one Albert G. Lawrence, and that she is now his wife.

They admit that the said Jane C. Kingsbury, on the 8th day of tober, 1868, filed her bill of complaint in the circuit court of

Cook county, in the State of Illinois, against the said Eva Lawrence, Albert G. Lawrence, the said complainant, and one
107 David J. Lake, who was then acting as guardian of the complainant; that the said Eva Lawrence and Albert G. Lawrence, on the 9th day of October, 1868, filed their cross-bill in the said cause and in the said court against the said Jane C. Kingsbury, the said complainant, and the said David J. Lake, and as to the contents of said bills these respondents refer to the same as they appear upon the files of this court.

And these respondents admit that on the — day of ——, 1869, the said complainant, by his next friend, Evaline A. Taylor, filed his cross-bill in said cause against said Jane C. Kingsbury, Eva Lawrence, Albert G. Lawrence, and the said David J. Lake, and as to the contents of said cross-bill these respondents refer to the same as the same now appears upon the files of this court, and they neither admit nor deny the allegations of the bill in regard to the contents of any or either of said bills.

And these respondents, further answering the bill of complaint, admit that the said Henry W. Kingsbury, the father of the complainant, in his lifetime, on the 25th day of March, 1862, at Fortress Monroe, in the State of Virginia, wrote with his own hand and signed a paper, of which "Exhibit A" attached to the bill is a correct copy, and that he then and there delivered the same to John McLean Taylor for safe keeping, but they deny the allegation of
108 the bill that he was not at the time of the execution of said paper an inhabitant or resident of said State of Virginia, and that he was not such an inhabitant or resident thereafter nor at the time of his death, and that he had no property of any kind whatever in said State of Virginia at the time of his death nor for a long time prior thereto; but, on the contrary, these respondents aver, upon information and belief, that at the time of the execution of said paper the said Henry W. Kingsbury was an inhabitant of the State of Virginia, and that he had property of some description in said State of Virginia at the time of his death and for some time prior thereto.

And these respondents admit that on the 9th day of May, 1870, the said paper purporting to be the last will and testament of said Henry W. Kingsbury was presented to the corporation court of the city of Alexandria, in the State of Virginia, and such proceedings were thereupon had that the said court ordered the said writing to be recorded as the true last will and testament of the said Henry W. Kingsbury, and that on the 10th day of May, 1870, the respondent, Ambrose E. Burnside, named in the said paper as one of the executors, qualified as such executor.

These respondents, further answering the bill of complaint, deny the allegation of the bill that the said court had no jurisdic-
109 tion to allow the probate of said will or the same to be recorded in manner and form as the same was done; that such probate and record was utterly void and of no effect against the complainant, and they admit that neither the complainant, Jane C. Kingsbury, Eva Lawrence, Albert G. Lawrence, or John McLe[an]

Taylor had any notice of the said application to the said court in the State of Virginia.

But these respondents, further answering said bill, aver that the said corporation court in the city of Alexandria, in the State of Virginia, had at the time of the said proceedings jurisdiction to admit wills to probate according to the statutes of the State of Virginia in such case made and provided; that at the time of such proceedings and before there was estate of the said Henry W. Kingsbury, deceased, in the city of Alexandria, in the State of Virginia; that it was competent for the said court to determine whether a cause sufficient to justify and invoke its action was presented, and that the said court did then and there determine that it had jurisdiction of said proceeding and the right to admit the said will to probate, and that, such proceedings being had by a court of competent jurisdiction, its action is conclusive upon all persons whatsoever; and they aver that the said proceedings were in all respects in con-
110 formity to the laws of the State of Virginia and the rules of said court.

And these respondents, further answering, said bill, admit that on the 11th day of July, 1870, the respondent, Ambrose E. Burnside, by his counsel, presented to the county court of Cook county, in the State of Illinois, a petition, together with a certified copy of said will and the probate thereof, according to the statute of the State of Illinois, and asked that the same be recorded in the manner directed by said statute, so as to be good and available in the State of Illinois in like manner as in the State of Virginia, and that such proceedings were thereupon had that said court of Cook county on the same day ordered that the same paper and proof be recorded in the said court, and that the same be treated and considered as good & available in law in like manner as a will executed in the State of Illinois.

And these respondents admit that such proceedings were had without notice to the said complainant, to the said Jane C. Kingsbury, Eva Lawrence, Albert G. Lawrence, or John McLean Taylor.

And these respondents admit that after making the said will and testament the complainant was born, and that no provision was
111 made in said will for him, and they aver that by the laws of the State of Virginia, where such will was made and proven, such posthumous birth did not revoke said will, but required the will to be so construed that it should read as if the devises and bequests therein had been limited to take effect in the event that the child shall die under the age of twenty-one years unmarried and without issue and, as to the effect of such posthumous birth on the title of the real estate in Illinois, these respondents are advised that the same is a question of law, and they submit the same to the decision of this court.

And these respondents deny that said will was not executed with the forms and solemnities to make the same good and available in law and for granting and conveying lands, tenements, hereditaments, moneys, goods, & chattels, as stated in said bill of complaint; but, on the contrary, they aver that the same was written, executed,

published, and proved in all respects according to the laws of the State of Virginia, and that the corporation court of the city of Alexandria, in said State, had full jurisdiction to decide the questions submitted to it and to admit the said will to probate, and that according to the provisions of the statute of Illinois the same,
112 being certified as required by the said statute and recorded in the said county of Cook, became good and available in law in like manner as wills made and executed in the State of Illinois.

And this respondent, Ambrose E. Burnside, avers that before the death of the said Henry W. Kingsbury he had the management of the estate of his father, Julius J. B. Kingsbury, for a long time; that he was the intimate friend and acquaintance of the said Henry W. Kingsbury, and that a short time before his death the said Henry W. Kingsbury made a special request of this respondent that he would look after his affairs and see that his wishes in regard to his business were carried out, and, being named in the said will as one of his executors, this respondent has felt it to be his duty to present the said will for probate and ask that its provisions should be enforced by the courts, and he avers that he was not desired to interfere with the rights or property of the said complainant, but simply discharge his duty under the will and to obey the last directions of the deceased.

And these respondents deny all fraud and combination
113 charged in the bill, and they also deny all other matters and things in the said bill of complaint contained which are material and necessary to be answered unto by them or either of them.

And now, having fully answered said bill of complaint, they pray to be hence dismissed with their reasonable costs, etc.

AMBROSE E. BURNSIDE,
By GOUDY & CHANDLER,
His Solicitors.

JOHN J. D. KINGSBURY,
By GOUDY & CHANDLER,
His Solicitors.

GOUDY & CHANDLER, *Solicitors, etc.*

And afterwards, to wit, on the 24th day of December, A. D. 1870, Henry W. Kingsbury, by Beckwith, Ayer & Kales, filed in said court his certain replication in the words and figures following, to wit:

STATE OF ILLINOIS, } *ss:*
Cook County, }

In the Circuit Court of Cook County of the December Term, 1870.
In Chancery.

The replication of Henry W. Kingsbury, a minor, by Corydon Beckwith, his next friend, complainant, to the answer of the
114 said defendant.

This repliant, saving and reserving to himself all and all

manner of advantage of exception which may be had or taken to the manifold errors, uncertainties, and insufficiencies of the answers of the said defendants, for replication thereunto saith that he does and will aver, maintain, and prove said bill to be true, certain, and sufficient in the law to be answered unto by the said defendants, and that the answers of the said defendants are very uncertain, evasive, and insufficient in the law to be replied unto by this repliant, without this, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by his said bill he has already prayed.

BECKWITH, AYER & KALES,
Solicitor- for Complainants.

And afterwards, to wit, on the 31st day of October, A. D. 1870, Mary K. Buckner and Simon B. Buckner, by Goudy and Chandler, their solicitors, filed in said court their certain cross-bill in the words and figures following, to wit:

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STATE OF ILLINOIS, } ss:
Cook County, }

MARY K. BUCKNER and SIMON B. BUCKNER
vs.
HENRY W. KINGSBURY, EVA LAWRENCE, ALBERT G. LAWRENCE, and JANE C. KINGSBURY. } In Chancery.

Circuit Court. October Term, 1870.

Cross-Bill.

To the circuit court of Cook county, in the State of Illinois:

Your orator-, Mary K. Buckner and Simon B. Buckner, of the county of Jefferson and State of Kentucky, unto your honors humbly complaining, show that in the — day of July, 1870, a certain bill of complaint was filed in the circuit court of Cook county, Illinois, by Henry W. Kingsbury, an infant under the age of twenty-one years, by Corydon Beckwith, his next friend, against Ambrose E. Burnside, Jane C. Kingsbury, Mary K. Buckner, Simon B. Buckner, John J. D. Kingsbury, Eva Lawrence, and Albert G. Lawrence, and in and by said bill it was alleged that on or about the 26th day of June, 1856, Julius J. B. Kingsbury departed this life intestate and seized of the following-described real estate situate in the city of Chicago, county of Cook, and State of Illinois, to wit:

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Lots number- five and 6, in block 35, in the original town of Chicago, and also all that part of the east half of the northwest quarter of section nine, in township 39 north, of range 14 east, of the third principal meridian, which lies east of the north branch of the Chi-

cago river and south of the center of Ontario street, excepting, however, a small portion of the said last-described tract, which the said decedent had previously conveyed to Simon B. Buckner, the title to which portion remained in said Buckner until on or about the 15th day of May, 1861, when the same was conveyed by said Buckner and wife to Henry W. Kingsbury, the father of the complainant; that the said Julius J. B. Kingsbury left surviving him his widow, Jane C. Kingsbury, who is still living, and two children, Mary K. Buckner, the wife of the said Simon B. Buckner, and Henry
117 W. Kingsbury, the father of the complainant, who were his only heirs-at-law; that on or about the fifteenth day of May, 1861, the said Simon B. Buckner and Mary K. Buckner, his wife, by their deed of that date duly executed and acknowledged, granted, bargained, sold, and conveyed to the said Henry W. Kingsbury, the father of the complainant, one undivided half of lots 5 and 6, in block number 35, in the original town of Chicago above described, and also all their right, title, and interest in and to the other tract of land above described situate in the northwest quarter of section 9, township 39 north, of range 14 east, of the third principal meridian; that afterwards, on or about the 4th day of December, 1861, the said Henry W. Kingsbury, the father of the complainant, intermarried with Eva Taylor, he being at that time a citizen and resident of Connecticut; that on or about the 17th day of September, 1862, the said Henry W. Kingsbury, the father of the complainant, was killed at the battle of Antietam, in the State of Maryland, he being at that time a citizen and resident of the State of Connecticut & colonel and commanding officer of a regiment of Connecticut volunteers engaged in the military service of the United States; that the said Henry W. Kingsbury at his death left surviving him his widow, Eva Kingsbury, the mother of the complainant,
118 who was still living, and afterwards, on the 16th day of December, 1862, there was born to him by his said widow a posthumous son, who was the complainant in said bill and the only heir-at-law of the said Henry W. Kingsbury, deceased; that the said Henry W. Kingsbury died intestate and seized in fee simple of all the real estate therein described, and the complainant held all the real estate by inheritance from his said father, subject to the dower estate of his mother and of Jane C. Kingsbury, the widow of Julius J. B. Kingsbury, and also subject to certain incumbrances outstanding against the said property or some portions thereof; that the said Eva Kingsbury, on the 26th day of September, 1865, intermarried with one Albert G. Lawrence, and that she was then his wife; that the said Jane C. Kingsbury, on the 8th day of October, 1868, filed her bill of complaint in the circuit court of Cook county, in the State of Illinois, against the said Eva Lawrence, Albert G. Lawrence, the complainant, and David J. Lake, who assumed to act as guardian of the complainant, and praying that her dower might be assigned to her and making the said bill a part of the bill of complaint; that the said Eva Lawrence and Albert G. Lawrence, on the 9th day of October, 1868, filed their cross-bill in the
119 said court and in the said cause against the said Jane C.

Kingsbury, the complainant, and David J. Lake praying that her dower in said premises might be assigned to her and making said cross-bill a part of the said bill of complaint; that on the — day of ——, 1869, the complainant, by his next friend, Evaline A. Taylor, filed his cross-bill in the said cause against said Jane C. Kingsbury, Eva Lawrence, Albert G. Lawrence, and the said David J. Lake — from his guardianship and for the appointment of a receiver of the income, rents, and profits of the said premises and to manage and lease the same and making the said cross-bill a part of said bill of complaint; that afterwards such proceedings were had in said causes and cross-causes that it was decreed that the said Jane C. Kingsbury was entitled to dower in said premises, and by reason thereof she was entitled to one-third of the rents and profits of the same, less one-third of the interest due upon certain mortgages in said decree mentioned, and that said Eva Lawrence was entitled to dower in two-thirds of said premises, by reason whereof she was entitled to two-ninths of the income of said premises, less two-ninths of the interest upon certain mortgages in said decree mentioned, and that the complainant was entitled to the income of the residue of said premises after *the* paying her portion of the interest upon said mortgages, and that in and by said decree
120 John Woodbridge was appointed receiver, with power to lease and manage the said real estate under the direction of the court and to receive the income thereof, and with directions to pay out of said income to said Jane C. Kingsbury and Eva Lawrence the sums to which they were, respectively, entitled, and providing for the complainant's support and maintenance, as well as for the payment of the interest upon said mortgages and other expenses incident to the care and management of said property, and making the record of said proceedings a part of said bill of complaint; that the said John Woodbridge accepted the office of and was duly qualified as said receiver and entered upon his duties as such, and that he hath from thence hitherto been and still is such receiver as aforesaid; that the complainant was informed and believed that the said Henry W. Kingsbury, his father, on the 25th day of March, 1862, at Fortress Monroe, in the State of Virginia, did write in his own hand and sign a paper, of which "Exhibit A," attached to said bill of complaint, was a correct copy, and that he then and there delivered the same to John McLean Taylor, therein named, for safe-keeping, and that his father was not at the time of the execution of said paper an inhabitant or resident at any time thereafter nor at the time of his death, and that he had no property of any
121 kind whatever in the said State of Virginia at the time of his death nor for a long time prior thereto; that he is advised and believed that on the 9th day of May, 1870, the said paper purporting to be the last will and testament of Henry W. Kingsbury was presented to the corporation court of the city of Alexandria, in the State of Virginia, and such proceedings were thereupon — as that the said court ordered the said writing to be recorded as the true last will and testament of Henry W. Kingsbury, father of the complainant, and that on the 10th day of May, 1870, Ambrose E.

Burnside, named in said paper as one of the executors, assumed to qualify as such, as by a copy of the proceedings of the said court annexed to said bill of complaint would more fully appear, and making the same a part of said bill; that the said court in the State of Virginia had no jurisdiction to allow the probate of said will or the same to be recorded in the manner and form as the same were done, and that said probate and record are utterly void and of no effect against the complainant, and that neither the complainant nor the said Jane C. Kingsbury, Eva Lawrence, Albert G. Lawrence, or John McLean Taylor had any notice of the said application and of the proceedings in the
122 said court in the State of Virginia; that on the 11th day of July, 1870, the said Ambrose E. Burnside presented to the county court of Cook county, in the State of Illinois, a petition in writing setting forth that said Henry W. Kingsbury, the father of the complainant, departed this life at Maryland, leaving a last will and testament, duly signed in the State of Virginia, which had been duly proved in said State, a certified copy of which he presented to said court for record, and praying that letters testamentary might be granted to him as one of the executors of the said will; that such proceedings were thereupon had at the said county court of Cook county, on the 11th day of July, 1870, that it was ordered by said court that the said papers and proof thereof be recorded in said court, and that the same be treated and considered as good and available in law in like manner as a will executed in this State; that the said proceedings in the said county court of Cook county were had without notice to your orators or to the said Jane C. Kingsbury, Eva Lawrence, Albert G. Lawrence, or John McLean Taylor, and that such proceedings ought to be held and adjudged of no force and effect as to the complainant's rights, and that such proceedings cloud the title and rights of the complainant, and
123 would, unless restrained, seriously embar-ass the administration of his property by the officer of the said court; that after the making of the said paper called the last will and testament of the father of the complainant the complainant was born, and that no provision was made in the said paper for your orator, and that it does not appear by said paper that it was the intention of the complainant's father to disinherit him, and that by reason of these facts, even if the said will was a valid will, the complainant would be entitled to receive out of the estate of his father the same as if he had died intestate, and that, being the sole and only heir of his father, he inherits the whole of his father's estate, subject to the dower of his mother and to the encumbrances thereon; that the said paper so produced as the last will and testament of the said Henry W. Kingsbury, the father of the complainant, was not signed by him in the presence of any attesting witness, nor was the same attested in the presence of the said Henry W. Kingsbury by any witness, and the complainant alleges that the said writing was not executed with the requisite forms and solemnities to make the same good and available in law for the granting, conveying, and assuring the lands, tenements, hereditaments, moneys, goods, and chattels

therein and thereby supposed to be given, granted, be-
124 queathed, and the complainant contests the validity of the said instrument and insists that the proceedings of the county court of Cook county ought to be reversed and set aside.

And in and by said bill of complaint it is charged that the complainant had hoped that no disputes would have arisen touching the rights of the complainant in the premises, but that the said Ambrose E. Burnside, combining and confederating with the other defendants thereinafter named or some of them, alleged and pretended that the said instrument was executed with all the formalties required by the laws of the State of Virginia relating to the execution of wills, and that since the said instrument was written and signed by the said Henry W. Kingsbury in that State it is entitled to probate in the State of Illinois, and is good and available in law in this State in like manner as wills made and executed here according to the forms and solemnities required by the laws of Illinois, and charged the contrary, and that the said Henry W. Kingsbury, deceased, was never a citizen of the State of Virginia, nor was he ever domiciled in that State, but at the time of making said instrument he was and ever after continued to be a citizen and resident
125 of the State of Connecticut; that he did not die in the State of Virginia, and was seized of no estate, real or personal, in that State at the time of his death; that the said instrument was ineffectual to operate as a valid will according to the laws either of the place of his domicile or of the State of Maryland, where he did [died], or either of the States where any portion of his property, either real or personal, was legally situated, for want of the requisite forms and solemnities to give the same effect; and the complainant submitted that under the facts and circumstances the instrument aforesaid is not entitled to probate by the laws of the State of Illinois, and in and by said bill of complaint it was stated that Jane C. Kingsbury, Mary K. Buckner, the wife of Simon B. Buckner, John J. D. Kingsbury, and Eva Lawrence, the wife of Albert G. Lawrence, were named in said instrument as devisees or legatees, and that they or some one or more of them claim thereunder some interest in the title of the complainant, whereas the complainant charges that they had not nor had either of them acquired any interest in the said estate by virtue thereof.

126 And in and by said bill the complainant prayed that the defendants might answer the matters stated in the bill of complaint without oath, and that the instrument therein referred to purporting to be the last will and testament of the said Henry W. Kingsbury, deceased, might be declared invalid and of no legal force or effect, and that the proceedings of the county court admitting the said instrument to record and directing that the same be treated as good and available in law in like manner as wills executed in this State might be reversed and set aside or declared to be null and void as constituting a cloud upon the complainant's title to the real estate therein described, and that the complainant's right and title by inheritance to the estate described in said bill as the posthumous son and only heir-at-law of the said Henry W. Kingsbury, deceased,

might be confirmed and established, and also praying for a temporary injunction against the said Ambrose E. Burnside restraining him from interfering with the real estate claimed by the complainant, or with the rents, issues, or profits thereof, and from attempting to interfere with the said John Woodbridge in the perform-
127 ance of his duties as receiver, and that on the final hearing of the cause the injunction might be made perpetual, and for general relief.

And your orators further show unto your honors that on the first day of November, 1870, they filed their joint and several answers to the said bill of complaint of Henry W. Kingsbury, a minor, who sues by his next friend, Corydon Beckwith, against Ambrose E. Burnside and others, and in and by said answer, after the usual protesting clause, your orators admitted the death of Julius J. B. Kingsbury intestate and seized of certain real estate described in said bill of complaint, and averring that he was also seized of other real estate described in the answer; that he left surviving Jane C. Kingsbury, his widow, and two children—your orator, Mary K. Buckner, and Henry W. Kingsbury, deceased; and your orator in said answer averred that the title to said real estate, as the same was vested in Julius J. B. Kingsbury, described [descended] to and vested in your orator, Mary K. Buckner, and the said Henry W. Kingsbury, subject to the right of dower of the widow, Jane C. Kingsbury, and that—your orator, Mary K. Buckner, being then the wife of your orator, Simon B. Buckner, and, there being issue living born of such marriage in the year 1858, a life estate as tenant, by courtesy, invitiate, to an
128 undivided half of the said real estate, subject to such dower estate, also vested in the said Simon B. Buckner; that at the time of the death of the said Julius J. B. Kingsbury the said Henry W. Kingsbury was a minor, and the respondent, Simon B. Buckner, had the control and management of said property until it was placed in the hands of Ambrose E. Burnside, as stated in said answer.

And your orators in said answer admitted that the deed dated May 15th, 1861, signed, sealed, and acknowledged as appeared therefrom, purporting to convey to the said Henry W. Kingsbury, deceased, an undivided half of the real estate described in the answer, was signed and acknowledged in the manner shown by said deed, and they attached a copy thereof, marked "Exhibit I," as part of their answer, by which they expressly denied that it granted, bargained, sold, and conveyed the title to said real estate, as alleged in the bill of complaint; but, on the contrary, your orator, Mary K. Buckner, averred that, as she was advised, the said indenture was not acknowledged according to the laws of the State of Illinois in such manner as to part [pass] her title to said property to the grantee, and therefore she averred the said deed was null and void as to her.

129 And your orators in said answer averred that said deed was prepared, signed, and acknowledged on the day of its date in the city of Louisville, in the State of Kentucky, where they then resided; that the said Henry W. Kingsbury was not present at the time and had no information or knowledge whatever that such instrument of writing was to be made or was being made, and that

such deed was then sent by your orator, Simon B. Buckner, to his agent in Chicago, with directions to file the same for record, which was done on the 17th of May, 1861, and which was the only delivery of such deed ever made to the said Henry W. Kingsbury, and that the said Henry W. Kingsbury had no information or knowledge whatever that any such deed had been made or recorded until two months thereafter; and they averred that the same was so made without any consideration, contract, bargain, or promise whatever; and they averred that, while the said Henry W. Kingsbury was ignorant in regard to said transaction, the sole purpose of the respondents in making said deed was to vest in the said Henry W. Kingsbury the legal title to the property described in said deed or indenture, to hold the same in trust, and not to create in him any beneficial interest whatever; that they, having full
130 confidence in the affection and integrity of the said Henry W. Kingsbury, voluntarily made such deed in the manner aforesaid, believing that he would not claim the rents and profits and would convey or reconvey the premises on request; & your orator, Simon B. Buckner, for himself, said that it was his own purpose and desire to waive any interest or claim in said property for the benefit of his wife in order that she might have and enjoy all the property descended from her father and that the control of the same might be placed in her family, and — which he, by his answer, claimed all his rights in equity, and under the law it was still with the desire and purpose effectually to divest himself in some legal and appropriate manner of all claims to said property, and he, in said answer, offered to submit to any decree the court might deem proper to that end; and your orator, in said answer, averred that the said Henry W. Kingsbury, frequently after he was informed of the facts and at all times during his lifetime, admitted that he held the title to said property described in the deed of May 15, 1861, in trust, and that he had no right or ownership for himself whatever, and express their confident belief that the said Henry W. Kingsbury would have recognized the equitable and just claim of your orators,
131 and that if he had lived this controversy would never have arisen; that the said Henry W. Kingsbury during his lifetime made no claim to the rents and profits of said real estate described in the deed of May 15th, 1861; that the same were received and controlled, as before said deed was made, by an agent, Ambrose E. Burnside, acting for Mrs. Jane C. Kingsbury, Henry W. Kingsbury, and your orator, and applied for the benefit of all of them the same as if no such deed had been made, and that possession was never taken or entry made under said deed by the said Henry W. Kingsbury or any other person.

And in and by said answer your orator further aver-ed that, on the 25th day of March, 1862, at Fortress Monroe, in the State of Virginia, the said Henry W. Kingsbury, who was then first lieutenant in the fifth regiment of artillery in the United States Army, wrote with his own hand and signed his last will and testament, and giving a true copy of the same in said answer.

And your orator averred that the only property in Chicago

vested in the said Henry W. Kingsbury at the time of making the said will or at any other time was the real estate which the said Julius J. B. Kingsbury left at his death, and which descended to the said Henry W. Kingsbury and the respondent, Mary K. Buckner, subject to the right of dower of Jane C. Kingsbury; and they also averred that the only transfer, grant, conveyance, or devise of property in Chicago ever made to the said Henry W. Kingsbury was made by the said deed or indenture of the 15th day of
132 May, 1861, thereinbefore described, and that the only Chicago property held in the name of Henry W. Kingsbury for the use of any person was the property described in the deed of May 15th, 1861, and was held in trust.

And in and by said answer your orators admitted that the said Henry W. Kingsbury, at the time mentioned in the bill, intermarried with Eva Taylor; that he was killed at the battle of Antietam at the time named, and left surviving him his widow, and, after his death, a posthumous son was born, as stated in the bill, and became his heir-at-law and was the complainant in the said suit.

And they admitted that Henry W. Kingsbury died seized of an undivided half of the real estate described from said Julius J. B. Kingsbury, but denied that he was the real owner of more than one undivided half thereof, subject to the right of dower of the said Jane C. Kingsbury and certain incumbrances thereon, and denied that he died intestate; and they admitted that Eva Kingsbury married Albert G. Lawrence at the time stated in the bill, and that she was his wife; and they admitted that Jane C. Kingsbury filed her bill in chancery against Eva Lawrence and others, as stated in bill complaint, and that Eva Lawrence and Albert G. Lawrence filed a cross-bill in said cause against J. C. Kingsbury and others, as alleged in the bill of complaint, and that the complainant, by his next friend, filed a cross-bill in said cause against Jane C.
133 Kingsbury and others, as stated in the bill, and also that John Woodbridge was appointed receiver, but neither admitting or denying the statements of the bill in regard to the proceedings in said cause or as to the contents of said bill.

And in and by said answer your orators admitted that on the 25th day of March, 1862, said Henry W. Kingsbury, at Fortress Monroe, in the State of Virginia, wrote with his own hand and signed a paper, of which "Exhibit A" attached to the bill of complaint was a true copy, and that he left the same at some place or with some person to them unknown; but they denied the statement of the bill that the father of the complainant was not at the time of the execution of the said paper an inhabitant or resident of Virginia, and that he was not such resident and inhabitant thereafter; and they also denied the statements of the bill that he had no property of any kind in the State of Virginia at the time of his death nor for a long time prior thereto; but, on the contrary, they averred that the said Henry W. Kingsbury was an inhabitant of the State of Virginia, and that he had property in said State, and at the time the paper was proven as the last will

and testament of the said Henry W. Kingsbury he had estate in the State of Virginia.

And they admitted that on the 9th day of May, 1870, said paper, a copy of which is given as "Exhibit A," was presented to the corporation court of the city of Alexandria, in the State of Virginia, and such proceedings were thereupon had that the
134 court admitted the said paper to record as the last will and testament of the said Henry W. Kingsbury, and that the said Ambrose E. Burnside, named as one of the executors, qualified as an executor.

And they averred in and by said answer that the paper was the last will and testament of the said Henry W. Kingsbury, that the said court had jurisdiction of such proceedings, and that the order and judgment of said court is conclusive of the question decided by it, and thereby the said last will and testament was admitted to probate, so that the same could not be questioned in any other proceeding.

And they admitted that on the 11th day of July, 1870, the defendant, Ambrose E. Burnside, presented a petition to the county court of Cook county, in the State of Illinois, together with a duly certified copy of said last will and testament of Henry W. Kingsbury, deceased, and the probate thereof, as required by the statutes of Illinois in such case made and provided, and such proceedings were thereupon had that an order was entered admitting the same to record in said court, as would [will] more fully appear by the certified copy thereof, which will be produced on the final hearing; and your orators in said answer averred that within twenty days after the entry of said order the complainant prayed an appeal from said order to the circuit court of Cook county, Illinois, which was allowed, and such appeal was then pending and undetermined in said court.

135 And in and by said answer your orators admitted that the complainant was born after the death of his father, and that there is no provision for him in said will, and they averred that by the laws of the State of Virginia, where said will was made and proven, such posthumous birth did not revoke said will or any part thereof, but required the will to be so construed that it should read as if the devises and bequests therein had been limited to take effect in the event that the child shall die under the age of twenty-one years unmarried, without issue; and, as to the effect of such posthumous birth on the title to real estate in Illinois, your orator stated that they were advised that the same was a question of law arising on the admitted facts, and they submitted the same to the decision of the court, but they expressed the hope and belief that the judgment of the court would give to the complainant all of the real estate which belonged to his father as if he had died intestate.

And they denied that said will was not executed with the forms and solemnity necessary to make the same good and available in law for the granting and conveying of lands, tenements, hereditaments, moneys, goods, and chattels, as stated in the said bill of complaint; but, on the contrary, they averred that the same was written, executed, published, and proved in all respects according to

the laws of the State of Virginia, where the same was made
136 and proved and where the said testator had estates, and the corporation court of the city of Alexandria, in said State, had full jurisdiction to decide the question as to the validity of said will and to admit the same to probate, and was, in fact, done, and, according to the provisions of the statute of Illinois, the same being certified as required by said statute and recorded in the county of Cook aforesaid, became good and available in law in like manner as wills made and executed in the State of Illinois.

And in and by said answer your orator denied that the said Henry W. Kingsbury, deceased, was a citizen, resident, or inhabitant of the State of Connecticut, as alleged in the bill; but they averred that Julius J. B. Kingsbury, the father of Henry W. Kingsbury, was, at the time the latter was born and for a long time prior thereto, an officer in the United States Army and had no fixed residence or place of abode, and that the said Henry W. Kingsbury was appointed in his boyhood a cadet at West Point and credited to the congressional district embracing Brooklyn, New York; that he passed through the regular course at that institution and was appointed a lieutenant in the United States Army and entered upon active service and continued in the same until his death, and they claimed that the said Henry W. Kingsbury never acquired a residence or citizenship, within the meaning of the law, in any particular State, although he was a citizen of the United States and
137 in its service and an inhabitant of such place as he happened to be ordered to in the discharge of his official duties.

And your orator, humbly complaining to your honors, further show- that on the 26th day of June, 1856, Julius J. B. Kingsbury died intestat- and seized in fee simple, subject to certain incumbrances, of real estate situated in the city of Chicago, county of Cook and State of Illinois, and described as follows, to wit:

Lots 5 and 6, in block 35, original town of Chicago, and also a certain tract of land described as follows in a deed dated May 30th, 1883, executed by James Kinzie and wife to said Julius J. B. Kingsbury and recorded May 31st, 1883, in Book A, page 139, in the Records of Deeds in Cook county, Illinois, to wit:

Bounded as follows: From the southeast corner of the town of Waubansia, commencing at the southeast corner of lot one, in block one, in said town of Waubansia (James Kinzie's Addition to Chicago), adjoining Kinzie street, in the town of Chicago (as laid off by the commissioners of the Illinois and Michigan canal), at a stake at the said corner of said lot, on the southwest bank of the North Branch of the Chicago river, at or near the water's edge, continuing at about north seventy-eight — west along the said southwest bank of said river, varying in distance from the water's edge in proportion to the distance of the east and the west lines dividing the lots, blocks, streets, and alleys of blocks 1, 2, and 3, in the said town of Waubansia (with the exception
138 of lot 8, in block 2, which was conveyed by said James Kinzie and wife to Seth Johnson, which said lot extended eastwardly into the centre of the channel of the North Branch of the Chicago

river) to the intersection of the west line of the said town of Waubansia; thence north and terminating in the Chicago river; thence from a stake ninety links from the corner, from which a poplar bears north seventy — east and a lynn bears south eighty-four degrees six-nineteen- chains and two links to a stake, from which a lynn bears north seventy-eight — thirty — west, and also bears north two — thirty — west; thence twenty-two chains and seventy-five links to a corner established by the commissioners of the Illinois and Michigan canal; thence 4.46 chains to the Chicago river (North Branch); thence 3.45 chains to the place of beginning, the same being one equal half of the remaining part of the east half of the northwest quarter of section nine, in township thirty-nine north, of range fourteen east, after taking therefrom the said town of Waubansia, and said half of said remaining part of said tract of land is supposed to contain thirty-five acres or near that quantity.

And which is otherwise described as all of the east half of the northwest quarter of section nine, in township thirty-nine north, of range fourteen east, of the third principal meridian, east of the southwest bank of the North Branch of the Chicago river, and south of an addition to Chicago formerly known as Sedgwick's,
139 and which is commonly known as the "Kingsbury tract."

And which real estate of which the said Julius J. B. Kingsbury died seized includes all of the land described in the original bill of complaint herein.

And the legal title to a part of said tract of land last described as a strip along the east bank of the North Branch of the Chicago river seventy feet in width for the full length of the tract was vested in your orator, Simon B. Buckner, by a deed dated January 22d, 1855, executed by the said Julius J. B. Kingsbury, but the said Julius J. B. Kingsbury was at his death the real owner thereof and your orator had no beneficial interest therein.

And your orators further show that the said Julius J. B. Kingsbury left surviving him a widow, named Jane C. Kingsbury, and two children—your orator, Mary K. Buckner, intermarried with your other orator, Simon B. Buckner, and Henry W. Kingsbury, now deceased; and your orators show that the title to the real estate hereinbefore described descended to and vested in your orators, Mary K. Buckner, and the said Henry W. Kingsbury, subject, however, to the widow's right of dower therein and to the incumbrances existing thereon.

And your orators also show that at the time of the death of the said Julius J. B. Kingsbury they were intermarried and afterwards, in the year 1858, had issue to such marriage, a daughter, who is now living; and your orator, Simon B. Buckner, became vested with a life estate as tenant by the courtesy initiate in the property
140 which descended to and vested in his wife.

And your orators further show that at the time of the death of the said Julius J. B. Kingsbury the said Henry W. Kingsbury was a minor, and your orator, Simon B. Buckner, had the full control and management of all the real estate which was left by the said Julius J. B. Kingsbury, and retained such control until it was placed

in the management of Ambrose E. Burnside, some time in December, 1860.

And your orators, further complaining, show that on the 15th day of May, 1861, they signed, sealed, and acknowledged a certain deed of indenture purporting to convey to the said Henry W. Kingsbury, now deceased, an undivided half of the following real estate, to wit: One undivided half of lots 5 and 6, block 35, in the original town of Chicago, Cook county, Illinois, and also the right, title, and interest in the Kingsbury tract, so called, being the tract of 35 acres, more or less, purchased from James Kinzie by the late Julius J. B. Kingsbury, of the United States Army, as per deed of said Kinzie on record in the clerk's office of Cook county, Illinois, the said tract being the south half of what remained of the northwest quarter of section nine, in township 39, range 14, in said Cook county, Illinois, after deducting therefrom the town of Waubansia; the other interest in said lands, tenements, &c., included in said deed belongs to said Henry W. Kingsbury, as one of the heirs of the late Major Julius J. B. Kingsbury, and the entire property being subject to the
141 dower interest of Jane C. Kingsbury, as will more fully appear by reference to a copy of said deed and certificate of acknowledgment filed herewith, marked "Exhibit A," and made a part of this bill of complaint; and said deed was by your orator, Simon B. Buckner, sent to his agent, in the city of Chicago, with directions to file the same for record, and such deed was received by the agent and filed by him in the proper office for record on the 17th day of May, 1861.

And your orators further show that the value of the property described in the said deed was large, to wit, five hundred thousand dollars, and it was the only property owned or held by your orator, Mary K. Buckner, except an undivided half of some real estate in Waterbury, Connecticut, of small value; and the said Henry W. Kingsbury was the owner of the other undivided half of the same property.

Your orators further show that said deed, as they are advised, was not acknowledged in accordance with the laws of the State of Illinois providing the manner in which deeds should be acknowledged by married women, and therefore claim that such deed is null and void as to your orator, Mary K. Buckner.

And your orators unto your honors further show that the said Henry W. Kingsbury, now deceased, was not present when said deed was executed by your orators; that he had no previous knowledge of the intention to execute the same, and that such deed was executed, acknowledged, and recorded without the said Henry
142 W. Kingsbury having any information or knowledge whatever upon the subject, and that he remained ignorant that such deed had been so made for several weeks, when he was informed of the facts in the premises, and they aver that the deed was made without any consideration, contract, arrangement, bargain, or promise whatever, and while the said Henry W. Kingsbury was ignorant thereof, and the deed was made under the circumstances herein set forth, the sole purpose of your orators in executing the same was to

vest the title of the property described in said deed in trust, and there was no purpose whatever on the part of either of your orators to make a gift of said property or any part thereof to the said Henry W. Kingsbury or to grant the same to him except as a naked trustee without any beneficial interest, and your orators, advised by counsel, claim that by the rules of equity a trust created by implication of law, or a resulting trust, arose for the use and benefit of your orators to the extent and according to their respective interests and title when such deed was made.

And your orator, Simon B. Buckner, for himself alone, shows unto your honors that it was his intention to waive all claims to said property and to allow his wife the sole use and enjoyment thereof and to place the control of the same in her own family, and that such intention had existed for a long time; yet he now claims
143 all his legal and equitable rights in the premises and asks that the trust created and arising as aforesaid may be enforced so as to enable him to carry into effect his unaccomplished intention, and he hereby offers to allow any decree your honors may see proper to render in this case to confer the sole control and benefit of said property on his wife, her heirs and assigns.

Your orators aver that they had full confidence in the affection and integrity of the said Henry W. Kingsbury and voluntarily made such deed in the manner aforesaid, believing that he would permit them to receive the rents and profits and convey or reconvey the premises as he might be requested by your orators or either of them.

And your orators further show that in the month of December, 1860, the said Henry W. Kingsbury and your orator, Simon B. Buckner, for themselves, the said Jane C. Kingsbury, and your orator, Mary K. Buckner, made an arrangement with Ambrose E. Burnside, who then resided in Chicago, to — charge of and manage said property as the agent of all of said parties, because none of them could conveniently do so.

And your orator unto your honors further shows that the said Henry W. Kingsbury, deceased, after he was informed of the execution of said deed, frequently and at all times during his lifetime admitted that he held the title to said property described in the deed of May 15th, 1861, in trust, and that he had no right or in-
144 terest therein except as a trustee aforesaid, and at same time expressed an intention to declare said trust in his will or reconvey the same.

And your orators express their confident belief that the said Henry W. Kingsbury would always have recognized the equitable and just claim of your orators, and would have reconveyed the same upon request if he had lived, and that no controversy would have arisen in regard to this matter; and they further aver that the said Henry W. Kingsbury during his lifetime made no claim to the rents and profits of the real estate described in the deed of May 15th, 1861, but such rents and profits were received and controlled as before said deed was made by an agent acting for Mrs. Jane C. Kingsbury, Henry W. Kingsbury, and your orator, and applied for the benefit of all of them the same as if no such deed had been made; and they

aver that the said Henry W. Kingsbury never exercised any acts of ownership or asserted any claim to said property inconsistent with the trust herein set forth.

And your orators unto your honor- further show that on the 25th day of March, 1862, at Fortress Monroe, in the State of Virginia, the said Henry W. Kingsbury, who was then a first lieutenant in the fifth regiment of artillery in the United States Army and engaged in the military service of the United States in the civil war then existing, wrote with his own hand and signed his last will and testament as follows, to wit:

145 "Expecting soon to start upon a military expedition where death may overtake me, I leave this as a record of my wishes respecting the disposition of my property.

"To my mother, Jane C. Kingsbury, I leave twenty thousand dollars, or so much of my Chicago property as upon fair appraisal may be valued at that amount.

"To my sister, Mary K. Buckner, I leave so much of the Chicago property held in my name as shall amount to one-third of the property in the city of Chicago, Ill., left by my father, Julius J. B. Kingsbury.

"To my cousin, John J. D. Kingsbury, I leave my property in Waterbury, Connecticut, and, in addition thereto, five thousand dollars, which I trust he will expend in completing his education.

"The remainder of my property of every description I leave to my devoted wife, Eva. I desire, moreover, that the provisions of this will may be so carried out that the yearly income of my wife for her own personal support shall never be less than two thousand dollars ($2,000).

"As executors I name Gen. Ambrose E. Burnside, of Rhode Island; Capt. John Taylor, com. d'p't U. S. Army.

"Signed at Fortress Monroe, March 25th, 1862,

"HENRY W. KINGSBURY,

"*1st L't 5th Reg't Artillery, U. S. Army.*"

146 And your orators aver and unto your honors show that the only property in Chicago vested in the said Henry W. Kingsbury at the time of making said will or at any other time was the real estate which the said Julius J. B. Kingsbury left at his death, and which descended to the said Henry W. Kingsbury and his sister, Mary K. Buckner, subject of the right of dower of Jane C. Kingsbury and to certain incumbrances thereon; and they also aver that the only transfer, grant, conveyance, or devise of property in Chicago ever made to the said Henry W. Kingsbury was by the said deed or indenture of the 15th day of May, 1861, hereinbefore described, and therefore they aver that the only Chicago property held in the name of the said Henry W. Kingsbury for the use of any person whatever at the time of making said will or at the time of his death was the property described in the deed of May 15th, 1861, so held as aforesaid in trust for your orators.

And your orators aver that at the time of writing said will the said Henry W. Kingsbury was only twenty-three years of age, had

just left West Point, was without any business experience, and unacquainted with the rules of law; that said property had been used solely to receive the rents and profits, and Mrs. Jane C. Kingsbury, the said Henry W. Kingsbury, and your orator, Mary K. Buckner, had been treated as if each was entitled to one-third, and, acting under the impression that his mother was the owner of one-
147 third of said property in fee instead of for life, and your orator, Mary K. Buckner, was also the owner of one-third, the provision was written in the will for your orator, Mary K. Buckner, with the purpose, on the part of said Henry W. Kingsbury, to declare said trust and to restore to the control of his sister all of the property which was described in the deed of May 15th, 1861, and therefore your orators claim that said will is a sufficient declaration in writing of said trust to take the same out of the statute of frauds if it was a trust within its provisions.

And your orators further show that said will of the said Henry W. Kingsbury was made and executed in conformity to the laws of the State of Virginia, and on the 9th day of May, 1870, the same was proved before and admitted to probate by the corporation court of the city of Alexandria, in the State of Virginia, a court having jurisdiction under the laws of that State of the probate of wills, as the true last will and testament of the said Henry W. Kingsbury, said court also having jurisdiction then and there to receive proof and admit to probate said will; and afterwards, to wit, on the 11th day of July, 1870, a copy of said will and probate thereof, duly certified according to the laws of the State of Illinois in such cases made and provided, was presented to the county court of Cook county, in the State of Illinois, and by said court then and there ordered to be recorded and to be good and available in law in like manner
148 as wills made and executed in this State, and the same was recorded in accordance with said order.

And your orators further show that the said Henry W. Kingsbury, on the 23d day of October, 1861, wrote with his own hand a letter to his mother, Jane C. Kingsbury, and signed the same by his signature "Henry," in which, among other things, he wrote: "I spent all the morning with Burnside, yesterday. He stated, as I told you, that Simon had made over all the Chicago property that was held in his name to me. A new power of attorney is therefore necessary from you and myself. We made one out. I signed it. Burnside will send it to you." And they aver that the reference in said letter by the words "as I told you" was to a conversation between the said Henry W. Kingsbury and his mother had in their last personal interview before the date of said letter, in which the said Henry W. Kingsbury expressly admitted that he held all the property of your orator, Mary K. Buckner, inherited from her father in trust for a short time, and said that he would restore it all to her whenever she desired.

And your orators show that the only delivery of said deed bearing date May 15th, 1861, ever made was the filing of the same for record by the said Simon B. Buckner, as hereinbefore set forth.

And your orators unto your honors further show that on or about

the 4th day of December, 1861, the said Henry W. Kingsbury, now deceased, married Eva Taylor, and on or about the
149 17th day of September, 1862, he was killed at the battle of Antietam, in the State of Maryland, and left surviving him his widow, Eva Kingsbury, and afterwards, on the 16th day of December, 1862, a posthumous son was born of the said widow, who was named after his father, Henry W. Kingsbury, and is the complainant in the original bill herein.

And your orators further show that the said Eva Kingsbury, on the 26th day of September, 1865, married one Albert G. Lawrence, and that they are now both living as husband and wife, and are defendants to the original bill herein.

And your orators unto your honors further show that the said Henry W. Kingsbury, the complainant in the original bill, his mother, Eva Lawrence, and her husband, Albert G. Lawrence, resided in the State of Rhode Island, and, as your orators are informed, the said Eva Lawrence is acting as guardian of her son, Henry W. Kingsbury, by virtue of some appointment made in the District of Columbia, and that said Henry W. Kingsbury has no guardian of his person or property in the State of Illinois.

And your orators unto your honors further show that the said Henry W. Kingsbury, by his mother and guardian and her husband, now assert- and claim- that he, the said Henry W. Kingsbury, is the owner in fee simple of the property discribed in the deed of May 15th, 1861, made by your orators, and hereinbefore set forth, and derived an absolute title by inheritance from his father,
150 and that he is entitled to all the rents and profits arising therefrom, subject only to the incumbrances which existed at the time of his father's death and to the right of dower of the said Jane C. Kingsbury, and also the right of dower of his mother, Eva Lawrence, and refuses to recognize the just and equitable claims of your orators or either of them, and the said Henry W. Kingsbury, Jane C. Kingsbury, and Eva Lawrence are in the receipt of all the rents and profits arising from said premises after the payment of taxes and interest on the incumbrances thereon.

But now so it is, may it please your honors, that the said Henry W. Kingsbury, Eva Lawrence, and other persons to your orators unknown, combining and confederating together to injure your orators and each of them, refuse to acknowledge the right of your orators in and to the real estate hereinbefore described, and deny that the said deed of May 15th, 1861, hereinbefore set forth, was and is a deed of trust, and alleged that the same as an absolute deed of conveyance, made for a sufficient consideration, and that if the said deed was in fact a deed of trust that such trust is not evidenced by any writing, and therefore is void, according to the provisions of the statute of frauds and perjuries, and they pretend that the said Henry W. Kingsbury is now the owner in fee simple of the whole of said real estate, subject to the dower of the said Jane C. Kingsbury and Eva Lawrence and the mortgages thereon.

151 Whereas your orators charge the truth to be that the said deed bearing date May 15th, 1861, was only a deed of

trust; that such trust arises by the implication of law, and is not therefore within the terms of the statute of frauds and perjuries, and, if it is, that the same is evidenced by a sufficient writing; and that your orator, Mary K. Buckner, is in equity the owner of an undivided half of the property left by the said Julius J. B. Kingsbury, and hereinbefore described, subject to the right of dower of Mrs. Jane C. Kingsbury and certain mortgages thereon, and that they are entitled to the rents and profits and possession according to their respective interests.

All which actings and doings of the said Henry W. Kingsbury, Eva Lawrence, Albert G. Lawrence, and their confederates are contrary to equity and good conscience, and tend to the manifest wrong, injury, and oppression of your orator-.

In tender consideration whereof, and forasmuch as your orators are without remedy at law and can only be relieved in a court of equity, where matters of this sort are properly cognizable, to the end, thereof [therefore], that the said Henry W. Kingsbury, Eva Lawrence Albert G. Lawrence, Jane C. Kingsbury, and their confederates may answer this bill of complaint (but not upon oath, that being hereby expressly waived, in pursuance of the provision of the statute), and

that as fully and particularly as if the same were here again
152 repeated and they severally interrogated thereunto;

And that the said deed bearing date May 15th, 1861, purporting to be executed by your orators and made an exhibit to this cross-bill of complaint may be declared null and void as to your orator, Mary K. Buckner; that the same may be declared a deed of trust to the said Henry W. Kingsbury, deceased, for the use and benefit of the grantors or one of them; that the said Henry W. Kingsbury, one of the defendants to this cross-bill of complaint, may be held and declared to hold the property described in said deed of May 15th, 1861, as a trustee in like manner, and that he be required by the decree of this honorable court to reconvey said property to your orators or one of them, as may be determined by the court; that an account may be taken of the receipts and disbursements from and about said property by the defendants, and such decree be entered as equity may require in regard to such receipts and disbursements; that the said Jane C. Kingsbury may have her right of dower ascertained and set off; that the said Eva Lawrence may have her dower fixed and assigned; that partition may be made of said real estate; that the possession of the property owned by your orators and hereinbefore described be restored to them as they may severally be entitled thereto, and that your orators may each have

such other and further relief as shall be just and equitable—
153 Your orators pray that a rule may be entered requiring the said Eva Lawrence, Albert G. Lawrence, and Jane C. Kingsbury to answer, plead, or demur to this cross-bill of complaint within some reasonable time to be fixed by your honors, and that a guardian *ad litem* be appointed for the said Henry W. Kingsbury, and that such guardian be required to answer and defend for the said Henry W. Kingsbury, and that the said defendants and their confederates, when discovered and made parties, be required to

stand to and abide such order and decree as may be entered in this cause during the course of proceedings and upon a final hearing.

And your orators will ever pray, etc.

GOUDY & CHANDLER,
Solicitors for Complainants.

154 EXHIBIT A.

Be it known that Simon B. Buckner and Mary K. Buckner, his wife, of the city of Louisville and State of Kentucky, in consideration of the sum of one dollar in hand paid and the natural love and affection we bear to our brother, Henry W. Kingsbury, do hereby grant, bargain, sell, and convey to said Henry W. Kingsbury, of the United States Army, his heirs and assigns forever, the following property, viz: One undivided half of lots number- five (5) and (6), in block number thirty-five (35), in the original town of Chicago, in the county of Cook and State of Illinois, and also all our right, title, and interest in the "Kingsbury tract," so called, being the tract of thirty-five acres, more or less, purchased from James Kinzie by the late Major Julius J. B. Kingsbury, of the United States Army, as per deed of said Kinzie on record in the clerk's office of Cook county, Illinois, the said tract being the south half of what remains of the northwest quarter of section nine, in township thirty-nine, range fourteen, in said Cook county, Illinois, after deducting therefrom the town of Waubansia.

The other interest in said land and tenements, etc., included in the deed now belongs to said Henry W. Kingsbury as one of the heirs of the late Major J. J. Kingsbury, and the entire property being subject to the dower interest of Mrs. Jane C Kingsbury;

155 to have and to hold the same to the said grantee, his heirs and assigns forever, the grantor- covenanting that — will warrant the property hereby conveyed.

In witness whereof we have hereunto set our hands and seals, at Louisville, this fifteenth day of May, 1861.

SIMON B. BUCKNER. [SEAL.]
MARY K. BUCKNER. [SEAL.]

STATE OF KENTUCKY, *County of Jefferson,* } *sct:*

Be it remembered that on the fifteenth day of May, A. D. 1861, before me, C. S. Thomasson, a notary public in and for said State and county, duly commissioned and qualified, personally appeared Simon B. Buckner and Mary K. Buckner, his wife, who were personally known to me to be the persons whose names are subscribed to the foregoing deed as having executed the same, and acknowledged that they had executed the same for the uses and purposes therein expressed.

And the said Mary K. Buckner, wife of the said Simon B. Buckner, being of lawful age and having been by me separate and apart from her said husband examined and the contents of the said deed

fully made known and explained to her, acknowledged that she had executed the same, and relinquished her dower in the lands and tenements therein mentioned voluntary and without compulsion of her said husband.

156 In witness whereof I have hereunto set my hand and affixed my official seal this fifteenth day of May, A. D. 1861.

[L. S.] C. S. THOMASSON.

Notary for Jefferson County, State of Kentucky.

No. 44987.
Filed May 17th, 1861.

And afterwards, to wit, at the October term, to wit, on the 4th day of November, A. D. 1870, the following, among other, proceedings were had in said court and entered of record in said cause as follows, to wit:

HENRY W. KINGSBURY, Minor, by His Next Friend, CORYDON BECKWITH,
vs.
AMBROSE E. BURNSIDE, JANE C. KINGSBURY, SIMON B. BUCKNER, J. J. D. KINGSBURY, EVA and ALBERT G. LAWRENCE.

On motion, ordered that the defendants in cross-bill file their answer to said cross-bill within fifteen days.

And afterwards, to wit, at the November term, to wit, on the 25th day of November, A. D. 1870, the following, among other, proceedings were had in said court and entered of record in said cause as follows, to wit:

157 MARY K. BUCKNER and SIMON B. BUCKNER
vs.
HENRY W. KINGSBURY, EVA LAWRENCE, ALBERT G. LAWRENCE, and JANE C. KINGSBURY. } Cross-Bill.

This cause coming up on the motion of the complainants in the cross-bill herein—

It is ordered that Corydon Beckwith be, and he is hereby, appointed guardian *ad litem* for Henry W. Kingsbury, one of the defendants to cross-bill, who is a minor, under 21 years of age, and that said guardian answer the cross-bill for said minor within ten days.

And thereupon afterwards, to wit, on the 2nd day of December, A. D. 1870, Henry W. Kingsbury, by Corydon Beckwith, his guardian *ad litem*, filed in said court his answer in words and figures following, to wit:

Answer of Henry W. Kingsbury, by Corydon Beckwith, His Guardian ad litem.

In the Circuit Court of Cook County. In Chancery.

The answer of Henry W. Kingsbury, a minor, by Corydon Beckwith, his guardian *ad litem*, one of the defendants, to the cross-bill of complaint of Mary K. Buckner and Simon B. Buckner, complainants.

This defendant, coming by his guardian *ad litem*, reserving
158 to himself all right of exception to the said cross-bill of complaint, for answer thereto says it is true that the bill of complaint of this defendant as aforesaid, Henry W. Kingsbury, an infant, by Corydon Beckwith, his next friend, against Ambrose E. Burnside, Jane C. Kingsbury, Mary K. Buckner, Simon B. Buckner, John J. D. Kingsbury, Eva Lawrence, and Albert G. Lawrence was filed in the circuit court of Cook county, Illinois, at the time alleged in said cross-bill; but whether the contents of said original bill have been well and truly set out in said cross-bill of complaint this defendant neither admits nor denies, but for greater certainty refers to said original bill for the contents thereof.

This defendant as aforesaid, further answering, says it is true that the complainants, Mary H. Buckner and Simon B. Buckner, on or about the 1st day of November, 1870, filed their joint and several answers to the said bill of complaint, as averred in said cross-bill; but this defendant neither admits nor denies that the said complainants have well and truly made answer to the several matters and things alleged in said bill, but refers to said answers and strict proof thereof.

This defendant as aforesaid, further answering, says he believes it to be true that the said Julius J. B. Kingsbury died on the 26th day of June, 1856, intestate, and that at the time of his death he was seized in fee simple of the lands and premises in the city of
159 Chicago, county of Cook and State of Illinois, as mentioned and described in said cross-bill, commonly known as the "Kingsbury tract," and that such real estate of which the said Julius J. B. Kingsbury died seized *of* includes all of the land in the original bill of complaint, and also that the legal title to a part of said tract of land described as a strip along the east bank of the north branch of the Chicago river 70 feet in width for the full length of the tract was vested in the complainant, Simon B. Buckner, by a deed dated January 22d, 1855, and executed by the said Julius J. B. Kingsbury; but whether the said Julius J. B. Kingsbury was at the time of his death, as is alleged in said cross-bill, the real owner thereof, and that the complainant, Simon B. Buckner, had no beneficial interest therein, this defendant has no knowledge and is unable to state.

This defendant as aforesaid, further answering, says he believes it to be true that the said Julius J. B. Kingsbury left surviving him a widow named Jane C. Kingsbury and two children, the complainant, Mary K. Buckner, who afterwards intermarried Simon B.

Buckner, the other complainant in said cross-bill, and this defendant's father, the said Henry W. Kingsbury, since deceased, and that the title to the real estate described in said cross-bill descended to aad vested in the said Henry W. Kingsbury and the said Mary K. Buckner, subject to the widow's right of dower and existing incumbrances therein.

159½ This defendant as aforesaid, further answering, says he believes it to be true that at the time of the death of the said Julius J. B. Kingsbury the said complainants, Simon B. Buckner and Mary K. Buckner, were married, and that they afterwards had issue of said marriage a daughter, whom this defendant is informed and believes to be living, and also that the complainant, Simon B. Buckner, became vested with a life estate as tenant by the curtesy initiate [invitiate] in any property which may have descended to and vested in his said wife, Mary K. Buckner.

This defendant as aforesaid, further answering, says it is true that at the time of the death of the said Julius J. B. Kingsbury the said Henry W. Kingsbury was a minor, and that the complainant, Simon B. Buckner, had the control and management of all the real estate which was left by the said Julius J. B. Kingsbury, and continued in the management thereof until it was placed under the management of Ambrose E. Burnside some time in December, 1860.

This defendant as aforesaid, further answering, says he believes it to be true that the said complainant, on or about the 15th day of May, 1861, signed, sealed, and acknowledged a certain deed or indenture purporting to convey to the said Henry W. Kingsbury, now deceased, an undivided half of all and singular the land and premises therein, and also in the said cross-bill of complaint in that belief [behalf] particularly described, as will more fully appear by

160 a certified copy of said deed and certificate of acknowledgment thereof, which, when produced, this defendant prays may be taken and considered as part of this his answer herein, and this defendant in this behalf alleges that the said deed of conveyance was made by the said complainants to the said Henry W. Kingsbury, deceased, upon and for a valuable consideration to them in that behalf, as by said deed or by a properly certified copy thereof, reference being had hereto, will more fully appear, but upon what consideration other than that stated in said deed this defendant does not know nor can he state, forasmuch as he is a stranger thereto, but he is advised and will insist that the same is wholly immaterial herein; and this defendant further alleges that the said deed was and is duly acknowledged by the said Mary K. Buckner, and that the certificate of acknowledgment stating particulars thereof was by the officers before whom the same was taken at the time thereof endorsed upon on [and] annexed to the same deed in manner and form as then was by the laws of the State of Illinois required in respect to married women, and that the said deed and the said acknowledgment are in due form to pass the estate of the said Mary K. Buckner of and in the said premises; and this defendant further alleges in this behalf that at the time of the making of the said

acknowledgment and at the time of the taking thereof by the said notary public, to wit, on the fifteenth day of May, 1861, the said Mary K. Buckner was above the age of eighteen
161 years, and that she did not at that time reside in the State of Illinois, but that she then resided in the State of Kentucky, and that she then and there, to wit, at the county of Jefferson and State of Kentucky, joined with her said husband in the execution of said deed, which was afterwards duly delivered, whereby she became barred of all estate, right, title, and interest in the premises in like manner as if she was sole and of full age; and this defendant further alleges that at the time of the making of the said acknowledgment and at the taking thereof by the said officer same was made by the said complainant and taken by the said officer in conformity with the laws of the said State of Kentucky, where the said deed was executed as aforesaid, and that the said acknowledgment was and is good and valid to all intents and purposes whatsoever; and this defendant further alleges that the said deed so made and acknowledged as aforesaid was afterwards, to wit, about the day of the date thereof, duly delivered by the said complainants to the said Henry W. Kingsbury, deceased, and this defendant does and will insist that the said deed and the execution and acknowledgment thereof was and were in due form of law to convey the said premises therein described, and that by the said deed, executed and acknowledged, the said complainants did thereby, for good and valuable consideration, convey to the said Henry W. Kingsbury, deceased, all of the claim, right, title, and interest of them and
162 each of them of, in, and to the therein-described premises.

This defendant as aforesaid, further answering, says, touching the allegations of the said bill of complaint to the effect that the said premises were conveyed to the said Henry W. Kingsbury, deceased, as naked trustee, to hold the same in trust, that he is a stranger to all and every the said matters in the behalf alleged, and that he cannot admit the same to be true, but, on the contrary, he does and will insist on strict proof thereof; and this defendant further, in this behalf, upon information and belief, denies that the said premises were conveyed to the said Henry W. Kingsbury, deceased, as aforesaid, upon any legal or valid trust, in manner and form as is in the said cross-bill of complaint alleged or supposed; and this defendant says, in this behalf, that by an act of the Legislature of the State of Illinois entitled "Frauds and perjuries," being chapter 44 of the Revised Statutes of 1845 and in force at the time of the making of the said deed of conveyance and from thence hitherto and now in force in this State, it is, amongst other things, enacted that all declarations or creations of trust or confidence of any lands, tenements, or hereditaments shall be manifested or proved by some writing signed by the party who is by law entitled to declare such trust or by his last will in writing, or else they shall be utterly void and of no effect: Provided, That resulting trusts or trusts created by construction, implication, or opera-
163 tion of law need not be in writing, and the same may be proved by parol; and this defendant alleges that the said

pretended trusts in the said cross-bill of complaint alleged and shown to the court are not resulting trusts nor trusts created by construction, implication, or operation of law, and he further alleges that the same are not nor have they been hitherto manifested nor can they be proved by some or any writing signed by the said Henry W. Kingsbury, deceased, nor by his last will in writing, and this defendant insists upon the said statute and claims the said [same] benefit therefrom as if he had pleaded the same.

This defendant as aforesaid, further answering, says that it may be true, as alleged in said cross-bill of complaint, that the said Henry W. Kingsbury, now deceased, about the 25th day of March, 1862, wrote with his own hand and signed a certain instrument in writing in and by the said cross-bill called a last will and testament and in said bill particularly set forth; but this defendant says he is a stranger thereto and leaves the said complainant to make full proof thereof and of the matters alleged in respect thereof, as they may be advised, and this defendant avers and will insist that the said pretended instrument of writing is wholly void as a devise of the real estate of the said Henry W. Kingsbury, deceased, situated in the State of Illinois, to wit, the lands and premises aforesaid, and that nothing in the said lands and premises passed to the
164 said complainants or either of them by or by force of the said pretended instrument of writing, and this defendant denies that the same was or is sufficient in the law to manifest or prove any trust or confidence of or concerning the lands and premises aforesaid in manner and form as the said complainants in their said cross-bill of complaint have in that behalf alleged or supposed.

This defendant as aforesaid, further answering, says he believes it to be true that on or about the 4th day of December, 1861, this defendant's father, the said Henry W. Kingsbury, now deceased, intermarried with the said Eva Lawrence, the mother of this defendant, and one of the defendants to said cross-bill, then Eva Taylor; that his father, the said Henry W. Kingsbury, was afterwards, on or about the 17th day of September, 1862, killed at the battle of Antietam, and that afterwards, to wit, on the 16th day of December, 1862, this defendant, a posthumous son, was born to him of her, the said Eva; that this defendant was named after his father and is the complainant in the original bill herein, and that afterwards, on the 26th day of September, 1865, the said Eva, this defendant's mother, intermarried with the said Albert G. Lawrence, another of the defendants to said cross-bill, as is alleged therein.

This defendant as aforesaid, further answering, says, as respects the said pretended and stated last will and testament of the
165 said Henry W. Kingsbury, deceased, and the alleged probate thereof under the laws of the State of Virginia, that he denies that said pretended paper-writing was or is executed or made by the said Henry W. Kingsbury, deceased, in such manner and form as to make the same good and valid devise or last will and testament, and he denies that the same was made, published, and declared by the said alleged testator in accordance with the laws of said State of Virginia, as is in said cross-bill alleged, and he alleges that at the

time and times of the alleged execution thereof and from thence up to and at the time of his death he, the said Henry W. Kingsbury, had not any property, real or personal, in nor did he then or his estate since owe any debts in said State of Virginia, and that at the time of his death and from thence hitherto and at the time and times of said alleged probating of the said paper-writing called a last will and testament in the said corporation court of the city of Alexandria there was not and had not been any property or effects which were of him or belonging to him, the said Henry W. Kingsbury, in his lifetime or of his estate since his death, and that at the time of his death he was not and he had never previously thereto been a citizen of nor had his domicile within the said State of Virginia; and this defendant alleges and insists that at the time and times when the said proceedings are alleged to have taken place in said corporation court touching said probate that said court had not
166 nor had it at any time or times previously jurisdiction in the premises to permit or allow the said pretended paper to be proved in said court as a last will and testament of the said Henry W. Kingsbury, and that the said pretended proceedings were without notice to this defendant.

This defendant as aforesaid, further answering, says he believes it to be true that the said Henry W. Kingsbury, deceased, was at the time of his death in the military service of the United States, but that at that time his place of residence and domicile was within the State of Connecticut, and that he was then a citizen thereof, and that he had not at that time or afterwards any property, effects, or residence within the State of Virginia, wherein it is by the said cross-bill alleged the said pretended will was written.

This defendant as aforesaid, further answering, says he believes it to be true that the said Henry W. Kingsbury, deceased, died seized of all and singular the lands and premises in the said cross-bill of complaint described, and that this defendant was the only child of said marriage of his said mother, the said Eva, and his said father, the said Henry W. Kingsbury, deceased.

And this defendant says that it doth not appear by said pretended will that it was the intention of the said Henry W. Kingsbury, deceased, to disinherit this defendant—that is to say, the said complainant in the original bill of complaint described, filed herein—and so this defendant says that he became and was upon his
167 birth entitled to have and receive all and singular the said lands and tenements, anything in the said pretended will to the contrary notwithstanding, and that from thence hitherto this defendant has been and still is seized of all and singular the said premises, subject to the rights of dower therein of the said Jane C. Kingsbury, his grandmother, and of the said Eva Lawrence, his mother, and that at the time of the filing of the said cross-bill herein the said Simon B. and Mary K. Buckner had not nor had either of them nor had they since had any right, title, or interest of or to the said premises or any part or parcel thereof in manner and form as they have in and by their said cross-bill alleged or claimed.

This defendant as aforesaid, further answering, says that at the

time of the filing of the said original bill of complaint herein and from thence hitherto his said mother, the said Eva Lawrence, one of the defendants to said cross-bill, hath been and still is in enjoyment of her said dower right and interest in the said lands and premises by and through the said John Woodbridge, receiver, appointed by this court in manner and form and under the proceedings in that behalf in the said original bill of complaint alleged and shown, and he believes it to be true that she hath good right to her said dower in and to the said lands and premises and every part thereof, anything in the said cross-bill of complaint alleged or stated to the contrary notwithstanding.

168 This defendant, further answering as aforesaid, says on his information and belief that prior to the time of the making of the said deed by the said Simon B. and Mary K. Buckner that they, the said Simon B. and Mary K. Buckner, or one of them, had received out of the estate of the said Julius J. B. Kingsbury divers large properties and interests and avails of real estate sold and conveyed to divers persons, the particulars and circumstances whereof were not at the time and times thereof well known to the said Simon B. Buckner and still well known to him and the said Mary K. Buckner or one of them.

And this defendant as aforesaid further saith that he is an infant under the age of twenty-one years—that is to say, of the age of seven years or thereabouts—and humbly submits his rights and interests to the protection of this honorable court.

C. BECKWITH,
Guardian ad Litem of Henry W. Kingsbury.

And thereupon afterwards, to wit, on the 2d day of December, A. D. 1870, Eva Lawrence and Albert G. Lawrence by Beckwith, Ayer and Kales, their solicitors, filed in said — their certain answer in words and figures following, to wit:

169 In the Circuit Court of Cook County. In Chancery.

Answer of Eva and Albert G. Lawrence to the Cross-Bill.

The joint and several answers of Eva Lawrence and Albert G. Lawrence, two of the defendants, to the cross-bill of complaint of Mary K. Buckner and Simon B. Buckner, complainants.

These defendants, reserving to themselves all right of exception to the said cross-bill of complain*ant*, for answer thereto say they admit that the bill of complaint of Henry W. Kingsbury, an infant, by Corydon Beckwith, his next friend, against Ambrose E. Burnside, Jane C. Kingsbury, Mary K. Buckner, Simon B. Buckner, John J. D. Kingsbury, Eva Lawrence, and Albert G. Lawrence was filed in the circuit court of Cook county, Illinois, at the time alleged in said cross-bill, but whether the contents of said original bill have been well and truly set out in said cross-bill by the said complainants these defendants neither admit or deny, but for greater certainty refer to said original bill for the contents thereof.

These defendants, further answering, say they admit that the complainants, Mary K. Buckner and Simon B. Buckner, on or about the first day of November, 1870, filed their joint and several answers to the said bill of complaint, as averred in said cross-bill; but these defendants neither admit nor deny that the said complainants
170 have well and truly made answer to the several matters and things alleged in said bill, but refer to the said answer and proof thereof.

These defendants, further answering, say they admit that the said Julius J. B. Kingsbury died on the twenty-sixth day of June, 1856, intestate, and that at the time of his death he was seized in fee simple of the lands and franchises in the city of Chicago, county of Cook and State of Illinois, as mentioned and described in said cross-bill, commonly known as the "Kinzie tract," and that such real estate of which the said Julius J. B. Kingsbury died seized *of* includes all of the lands in the original bill of complaint; and they also admit that the legal title to a part of said tract of land described as a strip along the east bank of the north branch of the Chicago river 70 feet in width for the full length of the tract was vested in the complainant, Simon B. Buckner, by a deed dated January twenty-second, 1855, and executed by the said Julius J. B. Kingsbury, but whether the said Julius J. B. Kingsbury was at the time of his death, as is alleged in said cross-bill, the real owner thereof, and that the complainant, Simon B. Buckner, had no beneficial interest therein, these defendants have no knowledge and are unable to state.

These defendants, further answering, say they admit that the said Julius J. B. Kingsbury left surviving him a widow, named Jane C. Kingsbury, and two children—the complainant, Mary K. Buckner,
171 who afterwards intermarried Simon B. Buckner, the other complainant in said cross-bill, and the said Henry W. Kingsbury, since deceased—and that the title to the real estate described in said cross-bill descended to and vested in the said Henry W. Kingsbury and the said Mary K. Buckner, subject to widow's right of dower and existing incumbrances thereon.

These defendants, further answering, say they admit that at the time of the death of the said Julius J. B. Kingsbury the said complainants, Simon B. Buckner and Mary K. Buckner, were married, and that they afterwards had issue of said marriage, a daughter, whom the defendants are informed and believe to be living; and they also admit that the complainant, Simon B. Buckner, became vested with a life estate as tenant by the curtesy initiate in any property which may have descended to and vested in his said wife, Mary K. Buckner.

These defendants, further answering, say they admit that at the time of the death of the said Julius J. B. Kingsbury the said Henry W. Kingsbury was a minor, and that the complainant, Simon B. Buckner, had the control and management of all the real estate which was left by the said Julius J. B. Kingsbury, and continued in the management thereof until it was placed under the management of Ambrose E. Burnside, some time in December, 1860.

These defendants, further answering, admit that the said
172 complainants, on or about the fifteenth day of May, 1861, signed, sealed, and acknowledged a certain deed or indenture purporting to convey to the said Henry W. Kingsbury, now deceased, an undivided half of all and singular the lands and premises therein, and also in the said cross-bill of complaint in that behalf particularly described, as will more fully appear by a certified copy of said deed and certificate of acknowledgment thereof, which, when produced, these defendants pray may be taken and considered as part of this their answer herein; and these defendants in this behalf allege that the said deed of conveyance was made by said complainants to the said Henry W. Kingsbury, deceased, upon and for a valuable consideration to them in that behalf, as by the said deed or by a properly certified copy thereof, reference being had thereto, will more fully appear, but upon what consideration other than that stated in said deed these defendants do not know nor can they state, forasmuch as they are strangers thereto, but they are advised and will insist that the same is wholly immaterial herein; and these defendants further allege that the said deed was and is duly acknowledged by the said Mary K. Buckner, and that the certificate of acknowledgment stating the particulars thereof was by the officer before whom the same was taken at the time thereof endorsed upon or annexed to the said deed in manner and form as then was by the laws of the State of Illinois required in respect of married women,
and that the said deed and the said acknowldgement are
173 in due form to pass the estate of the said Mary K. Buckner of and in the said premises; and these defendants further allege in this behalf that at the time of the making of the said acknowledgment of said deed and at the taking thereof by the said notary public, to wit, on the fifteenth day of May, 1861, the said Mary K. Buckner was above the age of eighteen years, and that she did not at that time reside in the State of Illinois, but that she then resided in the State of Kentucky, and that she then and there, to wit, at the county of Jefferson and State of Kentucky, joined with her said husband in the execution of said deed, which was afterwards duly delivered, whereby she became barred of all estate, right, title, and interest in the premises in like manner as if she was sole — and of full age; and these defendants further allege that at the time of the making of the said acknowledgement and at the taking thereof by the said officer the same was made by the said complainants and taken by the said officer, in conformity with the laws of the State of Kentucky, where the said deed was executed as aforesaid, and that the said acknowledgement was and is good and valid to all intents and purposes whatsoever; and these defendants further allege that the said deed so made and acknowledged as aforesaid was afterwards, to wit, about the day of the date thereof, duly delivered by the said complainants to the said Henry W. Kings-
174 bury, deceased; and these defendants do and will insist that the said deed and the execution and acknowledgment thereof was and were in due form of law to convey the said premises therein described, and that by the said deed so executed and acknowledged

the said complainants did thereby, for good and valuable consideration, convey to the said Henry W. Kingsbury, deceased, all of the claim, right, title, and interest of them and each of them of, in, and to the therein-described premises.

These defendants, further answering, say, touching the allegations of the said bill of complaint to the effect that the said premises were conveyed to the said Henry W. Kingsbury, deceased, as naked trustee to hold the same in trust, that they are strangers to all and every the said matters in that behalf alleged, and that they cannot admit the same to be true, but, on the contrary, they do and will insist on strict proof thereof.

And these defendants further in this behalf, upon this information and belief, deny that the said premises were conveyed to the said Henry W. Kingsbury as aforesaid upon any legal or valid trust in manner and form as in the said cross-bill of complaint alleged or supposed; and these defendants say in this behalf that by an act of the Legislature of the State of Illinois entitled "Frauds and Perjuries," being chapter 44 of the Revised Statutes of 1845 and in force at the time of the making of said deed of conveyance, and from thence hitherto and now in force in
175 this State, it is, amongst other things, enacted that all declarations or creations of trust or confidences of any lands, tenements, or hereditaments shall be manifested and proved by some writing signed by the party who is by law entitled to declare such trusts or by his last will in writing or else they shall be utterly void and of no effect: Provided, That resulting trusts or trusts created by construction, implication, or operation of law need not be in writing, and the same may be proved by parol; and these defendants allege that the said pretended trusts in the said cross-bill of complaint alleged and shown to the court are not resulting trusts nor trusts created by construction, implication, or operation of law, and they further allege that the same are not nor have they been hitherto manifested nor can they be proved by same or any writing signed by the said Henry W. Kingsbury, deceased, nor by his last will in writing, and these defendants insist upon the said statute and claim the same benefit therefrom as if they had pleaded the same.

These defendants, further answering, say that it may be true, as alleged in said cross-bill of complaint, that the said Henry W. Kingsbury, now deceased, on or about the 25th day of March, 1862, wrote with his own hand and signed a certain instrument of writing in and by the said cross-bill called a last will and testament and in said bill particularly set forth, but these defendants say they
176 and each of them are strangers thereto, and they leave the said complainants to make full proof thereof as they may be advised; and these defendants do and will insist that the said pretended instrument of writing is wholly void as a devise of the real estate of the said Henry W. Kingsbury, deceased, situated in the State of Illinois, to wit, the lands and premises aforesaid, and that nothing in the said lands and premises passed to the said complainants or either of them by or by force of the said pretended instrument of writing, and these defendants deny that the same was or is

sufficient in the law to manifest or prove any trust or confidence of or concerning the lands and premises aforesaid in manner and form as the said complainants in their said cross-bill of complaint have in that behalf alleged or supposed.

These defendants, further answering, admit that on or about the 4th day of December, 1861, the said Henry W. Kingsbury, now deceased, intermarried with the said Eva Lawrence, one of these defendants, then Eva Taylor; that said Kingsbury was afterwards, on or about the 17th day of September, 1862, killed at the battle of Antietam, and that afterwards, to wit, on the 16th day of December, 1862, a posthumous son was born to him of her, the said Eva; that he was named after his father and is the complainant in the original bill herein, and that afterwards, on the 26th day of September, 1865, the said Eva intermarried with the said Albert G. Law-
177 rence, the other of these defendants, as is alleged in said cross-bill.

These defendants, further answering, say that the said Henry W. Kingsbury, deceased, was, at the time of his death, in the military service of the United States, but that at that time his place of residence and domicile was within the State of Connecticut, and that he was then a citizen thereof, and that he had not at that time or afterwards any property, effects, or residence within the State of Virginia, wherein it is by the said cross-bill alleged the said pretended bill was written.

These defendants, further answering, say that the said Henry W. Kingsbury, deceased, died seized of all and singular the lands and premises in the said cross-bill of complaint described, and that the said posthumous son was the only child of said marriage of the said Eva and the said Henry W. Kingsbury, deceased; and these defendants say that it doth not appear by the said pretended will that it is the intention of the said Henry W. Kingsbury, deceased, to disinherit the said posthumous child—that is to say, the said complainant in the original bill of complaint filed herein; and so these defendants say that the said posthumous child became and was upon his birth entitled to have and receive all and singular the said lands and tenements, anything in the said pretended will to the contrary notwithstanding, and that from thence hitherto the said posthumous
178 child has been and still is seized of all and singular the said premises, subject to the rights of dower therein of the said Jane C. Kingsbury, his grandmother, and of the said Eva Lawrence, one of these defendants, his mother, and that at the time of the filing of the said cross-bill herein the said Simon B. and Mary K. Buckner had not nor had either of them nor have they since had any right, title, or interest of, in, or to the said premises or any part or parcel thereof in manner and form as they have in and by their said cross-bill alleged or claimed.

These defendants, further answering, say that at the time of the filing of the said original bill of complaint herein and from thence hitherto the said Eva Lawrence, one of these defendants, has been and still is in the enjoyment of her said dower right and interests in the said lands and premises by and through the said John

Woodbridge, receiver, appointed by this court, in manner and form and under the proceedings in that behalf in the said original bill of complaint alleged and shown, and that she hath good right to her said dower in and to the said lands and premises and every part thereof, anything in the said cross-bill of complaint alleged or stated to the contrary notwithstanding.

These defendants, further answering, say, as respects the said pretended and stated last will and testament of the said Henry W. Kingsbury, deceased, and alleged probate thereof under the
179 laws of the State of Virginia, that they deny that said pretended paper writing was or is executed or made by the said Henry W. Kingsbury, deceased, in such manner and form as to make the same a good and valid devise or last will and testament, and they deny that the same was made, published, and declared by the said alleged testator in accordance with the laws of the State of Virginia, as in said cross-bill alleged, and they allege that at the time and times of the alleged execution thereof and from thence up to the time of his death he, the said Henry W. Kingsbury, had not any property, real or personal, in nor did he then or his estate since owe any debts in said State of Virginia, and that at the time of his death and from thence hitherto and at the time and times of said alleged probating of the said paper writing called a last will and testament in the corporation court of the city of Alexandria there was not and had not been any property or effects which were of him or belonged to him, the said Henry W. Kingsbury, in his lifetime or his estate since his death, and that at the time of his death he was not and he had never previously thereto been a citizen of nor had his domicile within the said State of Virginia.

And these defendants allege and insist that at the time and times when the said proceedings are alleged to have taken place in said corporation court touching said probate that said court had not nor had it at any time or times previously jurisdiction in the premises to permit or allow the said pretended paper to be
180 proved in said court as a last will and testament of the said Henry W. Kingsbury, and that the said pretended proceedings were without notice to these defendants; and these defendants deny all manner of illegal or inequitable pretences wherewith they are by said cross-bill charged, without this, that there is any other matter, cause, or thing in the said complainant's said bill of complaint contained material or necessary for these defendants to make answer unto and not herein or hereby well and sufficiently answered, confessed, traversed and avoided, or denied is true, to the knowledge or belief of these defendants; all which matters and things these defendants are ready and willing to aver and maintain and prove as this honorable court — direct, and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf sustained.

EVA LAWRENCE,
ALBERT G. LAWRENCE,
By their solicitor, B. F. AYER.

And thereupon, afterwards, to wit, on the 5th day of December, A. D. 1870, Simon B. Buckner and Mary K. Buckner, by their solicitors, Goudy & Chandler, filed in said court their certain replications to the joint and several answers of Eva Lawrence,
181 Albert G. Lawrence, and Henry W. Kingsbury in words and figures following, to wit:

Replication.

STATE OF ILLINOIS, } ss:
Cook County, }

In the Circuit Court of Cook County, of the November Term, 1870. In Chancery.

The replication of Simon B. Buckner and Mary K. Buckner, complainants, to the joint and several answers of Eva Lawrence and Albert G. Lawrence, two of the defendants, to the cross-bill of said complainants.

These repliants, saving and reserving to themselves all and all manner of advantage of exception which may be had and taken to the manifold avows [errors], uncertainties, and insufficiencies of the answer of the said defendants, for replication thereunto says that they do and will aver, maintain, and prove said cross-bill to be true, certain, and sufficient in the law to be answered unto by the said defendants, and that the answer of the said defendant- is very uncertain, evasive, and insufficient in the law to be replied unto by these repliants, without this, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avowed [avoided], traversed or denied, is true; all which matters and
182 things these repliants are ready to aver, maintain, and prove as this honorable court shall direct, and humbly pray as in and bytheir said cross-bill they have already prayed.

GOUDY & CHANDLER,
Solicitors for Complainants in said Cross-Bill.

Replication.

STATE OF ILLINOIS, } ss:
Cook County, }

In the Circuit Court of Cook County, of the November Term, A. D. 1870. In Chancery.

The replication of Simon B. Buckner and Mary B. Buckner, complainants, to the answer of Henry W. Kingsbury, by his guardian *ad litem*, to the cross-bill of complainant of said complain-ts.

These repliants, saving and reserving to themselves all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the said defendant, for replication thereunto saith that they do

and will aver, maintain, and prove said cross-bill to be true, certain, and sufficient in the law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive, and insufficient in the law to be replied unto by these
183 repliants, without this, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things these repliants are ready to aver, maintain, and prove as this honorable court shall direct, and humbly pray as in and by their said cross-bill they have already prayed.

GOUDY & CHANDLER,
Solicitors for Complainants in said Cross-Bill.

And afterwards, to wit, at the December term, to wit, on the 24th day of December, A. D. 1870, the following, among other, proceedings were had in said court and entered of record in said cause as follows, to wit:

STATE OF ILLINOIS:

Cook County Circuit Court. December Term, 1870.

HENRY W. KINGSBURY, a Minor, Who Sues by His Next Friend, CORYDON BECKWITH,
vs.
AMBROSE E. BURNSIDE, SIMON B. BUCKNER,
184 Mary K. Buckner, Jane C. Kingsbury, John J. D. Kingsbury, Eva Lawrence, and Albert G. Lawrence.
} Original Bill in Chancery.

MARY K. BUCKNER and SIMON B. BUCKNER
vs.
HENRY W. KINGSBURY, JANE C. KINGSBURY, EVA LAWRENCE, and ALBERT G. LAWRENCE.
} Cross-Bill in Chancery.

This cause coming on for a final hearing on the bill of complaint, the answers and replications, the cross-bill of complaint, the answers and replications, and the evidence and proofs taken, produced, and read in evidence, and the court being now sufficiently advised in the premises—

It is ordered, adjudged, and decreed that the original bill of complaint be dismissed without prejudice, and that the defendants hereto have and recover their costs in this behalf expended.

And it is further ordered, adjudged, and decreed that the cross-bill of complaint be dismissed without prejudice, and that the defendants thereto have and recover their costs in this behalf expended.

And it is further ordered that this decree be entered as of the 24th

day of December, 1870, *by* and thereupon the complainant in
185 the original bill; by his next friend, Corydon Beckwith, prayed an appeal to the Supreme Court, and, a bond being waived by the other parties, such appeal is allowed.

And thereupon the complainants in the cross-bill prayed an appeal to the supreme court, and, a bond being waived by the other parties, such appeal is allowed.

And the parties aforesaid in open court agree that such appeals may be prosecuted to and the record filed in the central grand division at its next term, and that one record may be used for both appeals.

And thereupon, afterwards, to wit, on the 31st day of December, A. D. 1870, the Honorable John G. Rogers, one of the judges of said court, signed a certain certificate of evidence in words and figures following, to wit:

STATE OF ILLINOIS:

Cook County Circuit Court. December Term, 1870.

HENRY W. KINGSBURY, a Minor, Who Sues by His Next Friend, CORYDON BECKWITH, *vs.* AMBROSE E. BURNSIDE, SIMON B. BUCKNER, MARY K. Buckner, John C. Kingsbury, John J. D. Kingsbury, Eva Lawrence, and Albert G. Lawrence.	Original Bill in Chancery.
186 MARY K. BUCKNER and SIMON B. BUCKNER, *vs.* HENRY W. KINGSBURY, JANE C. KINGSBURY, EVA LAWRENCE, and ALBERT G. LAWRENCE.	Cross-Bill in Chancery.

Certificate of Evidence.

I, John G. Rogers, a judge of the circuit court of Cook county, Illinois, hereby certify that the following evidence was introduced and read on the final hearing of the above cause:

Testimony of the Complainant in the Original Bill.

1. The statutes of the State of Kentucky in force at the time of the acknowledgment by Mary K. Buckner of the certain deed of herself and her husband to Henry W. Kingsbury hereinafter put in evidence and dated the 15th day of May, 1861.

And here in open court it was thereupon stipulated that said statutes might be here and on appeal in the supreme court read with the same effect from the authorized publication thereof as if here inserted at large.

2. And the following stipulation was also read in evidence:

Stipulation.

187 For the purposes of this trial and the appeal thereof it is admitted that Henry W. Kingsbury, deceased, had no property of any kind in the State of Virginia at the time of his death, and that since his death there has been no property in said State belonging to his estate except such as may be claimed from the following circumstances:

That General S. B. Buckner, a citizen and resident of Kentucky, had some money on deposit just prior to and on May 9, 1870, in Alexandria, in the State of Virginia, and A. E. Burnside, one of the executors named in the will or paper purporting to be such, claiming that said Buckner was indebted to said Kingsbury estate, attached said money in a suit to recover the amount of said claim; also that at time of Henry W. Kingsbury's death some books, drawings, and papers, not exceeding in value one hundred dollars, claimed to belong to Henry W. Kingsbury were in the possession of S. B. Buckner; that afterwards and not more than ten days or two weeks before May 9, 1870, the said books, drawings, and papers were carried by S. B. Buckner to Alexandria, in the State of Virginia, from some place out of the same, which books, drawings, and papers were in Alexandria, in the State of Virginia, at the time the said will was probated, and have since remained there.

GOUDY AND CHANDLER,
Solicitors for the Parties for Whom They Have Appeared.

188 Also copy of power of attorney from Henry W. Kingsbury and Jane C. Kingsbury to A. E. Burnside, dated October 22, 1861:

Know all men by these presents that we, Jane C. Kingsbury, of Lynn, Connecticut, and Henry W. Kingsbury, of the U. S. Army, have made, constituted, and appointed, and by these presents do make, constitute, and appoint, Ambrose E. Burnside, of New York, our true and lawful attorney, for us and in our name, place, and stead to transact and conduct the business of the Kingsbury estate, of Chicago; to collect rents, make improvements and repairs, lease property, conduct lawsuits, and do whatever else is necessary for the interest of the estate, but with no power to dispose of the property except in the way of negotiating loans, etc., with the ordinary restrictions, and with no power to lease property for a longer term than three years without our consent, giving and granting unto him, said attorney, full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully, to all intents and purposes, as we might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that the said attorney or his substitute shall lawfully do or cause to be done by virtue hereof.

In witness whereof we have hereunto set our hands and seals the

22d day of October, in the year one thousand eight hundred
189 and — one.

HENRY W. KINGSBURY,
[SEAL.] *U. S. Army.*
JANE C. KINGSBURY.

Sealed and delivered in presence of—
JAMES H. CAUSTEN,
To H. W. Kingsbury.
OLIVER J. LAY,
To Jane C. Kingsbury.

DISTRICT OF COLUMBIA, } *To wit:*
City of Washington, }

Be it known that on the twenty-second day of October, in the year one thousand eight hundred and sixty-one, before me, James H. Causten, notary public, personally appeared H. W. Kingsbury, the maker of the aforegoing letter of attorney, and acknowledged the above letter of attorney to be his act and deed.

In testimony whereof I have hereunto subscribed my name the day and year last above written and affixed my notarial seal.

[SEAL.] JAMES H. CAUSTEN,
Notary Public.

190 STATE OF CONNECTICUT, } *ss:*
New London County, Old Lynn, }

Be it known that on the thirteenth day of October, A. D. 1861, before me, Oliver J. Lay, notary public, personally appeared Jane C. Kingsbury, one of the makers of the foregoing power of attorney, and acknowledged the same to be her act and deed.

In testimony whereof I have hereunto subscribed my name the day and year last above written and affixed my notarial seal.

[L. S.] OLIVER J. LAY,
Notary Public.

No. 49305. Filed November 7, 1861.

The complainants in the cross-bill and the defendants to the original bill also offered and read in evidence the following proof, to wit:

1. A patent issued by the State of Illinois to Robert Kinzie, dated July 5, 1833, granting and conveying in fee lot 5, in block 35, in the original town of Chicago, Cook county, Illinois, according to the plat of said town made by the commissioners of the Illinois and Michigan canal, laid out in the S. ½, section 9, township 39 N., — 14 E., of the 3d principal meridian, being canal land, reciting that said lot had been purchased by said Kinzie Sept. 27, 1830.

2. A deed from Robert Kinzie to Julius J. B. Kingsbury,
191 dated May 31, 1833, conveying in fee, with the usual covenants of title and warranty, the same lot for the consideration of $60.

3. A patent issued by the State of Illinois to John B. Beaubien,

dated July 18, 1831, granting and conveying in fee lot 6, in block 35 aforesaid, reciting that it had been purchased by said Beaubien Sept. 27, 1830.

4. A deed from John B. Beaubien and wife to Julius J. B. Kingsbury, dated May 31, 1833, conveying in fee said lot 6, in block 35 aforesaid, for the consideration of $50.

5. A patent issued by the State of Illinois to James Kinzie, dated October 20, 1831, granting and conveying in fee the E. ½ N. W. ¼, section 9, township 39 N., of range 14 E., of the 3d principal meridian, containing eighty acres and being canal land, and which had been sold to said Kinzie Sept. 28, 1830, for $140.

6. A deed from James Kinzie and wife to Julius J. B. Kingsbury, dated May 30, 1833, and recorded May 31, 1833, in Book A, page 139, which reads as follows:

This indenture, made and entered into this thirtieth day of May, in the year of our Lord one thousand eight hundred and thirty-three, by and between James Kinzie and Leah Kinzie, his wife, of the town of Chicago, Cook county, Illinois, and Lieutenant Julius J. B. Kingsburg, of the United States Army, witnesseth:

That the said James Kinzie and Leah Kinzie, his wife, party of the first part aforesaid, for and in consideration of the
192 sum of seven hundred dollars, current money of the United States, to them in hand paid by the said Julius J. B. Kingsbury, party of the second part aforesaid, the receipt whereof is hereby acknowledged and the said party of the second part therefrom discharged, have granted, bargained, and sold, aliened, released, and confirmed, and by these presents doth grant, bargain, and sell, alien, release, and confirm, unto the said Julius J. B. Kingsbury the following-described lot or parcel of land situate, lying, and being in Cook county, in the State of Illinois, and adjacent to the town of Chicago, and described and bounded as follows, to wit:

From the southeast corner of the town of Waubansia, commencing at the southeast corner of lot number one, in block number one, in the said town of Waubansia (James Kinzie's Addition to the town of Chicago), adjoining Kinzie street, in town of Chicago (as laid off by the commissioners of the Illinois and Michigan canal), at a stake at the said corner of said lot on the southwest bank of the North Branch of the Chicago river, at or near the water's edge on the said bank of the said branch of the said Chicago river, continuing at about north twenty-eight — west along the said southwest bank of the North Branch of the Chicago river, varying in distance from the water's edge in proportion to the distance of the east and west lines dividing the lots, blocks, streets, and alleys of
193 blocks one, two, and three, in the said town of Waubansia with the exception of lot number eight, in block number two, which was conveyed by the said James Kinzie and Leah, his wife, to Seth Johnson, which said lot extends eastwardly unto the centre of the channel of the North Branch of the Chicago river to the intersection of the west line of the town of Wabansia; thence north and terminating in the Chicago river; thence from a stake ninety links from the corner, from which a poplar bears north seventy

— east and a lynn bearing south eighty-four degrees six — nineteen chains and two links to a stake, from which a lynn bears north seventy eight — thirty — west, and also bears north two — thirty — west; thence twenty-two chains and seventy-five links to a corner established by the commissioner of the Illinois and Michigan canal; thence four chains and forty-six links to the Chicago river (North Branch); thence three chains and forty-five links to the place of beginning, the same being the one equal half of the remaining part of the east half of the northwest quarter of section number nine, in township number thirty-nine north, range fourteen east, after taking therefrom the said town of Wabansia, and the said half of the said remaining part of said tract of land is supposed to contain thirty-five acres or near that quantity, be the same more or less:

To have and to hold the said tract or parcel of land before described and hereby conveyed to the said Julius J. B. Kingsbury, his heirs and assigns forever, and to his and their only proper use and benefit and behoof, together with all and singular the rights, privileges, and appurtenances, rents, issues, and profits, remainder and remainders, reversion and reversions, unto the same belonging or in anywise appertaining.

194

And the said James Kinzie and Leah Kinzie, his wife, hereby covenants and agrees to and with the said Julius J. B. Kingsbury that before the unsealing and delivery of these presents they were well seized of the premises hereby conveyed of a good, indefeasable estate in fee simple, and that they had good, right full power, and legal authority to sell and convey the same in manner and form aforesaid, and that the same is free from all incumbrances whatever.

And the said James Kinzie and Leah, his wife, further covenants and agrees to and with the said Julius J. B. Kingsbury that they will warrant and forever defend the premises hereby conveyed against the claim or claims of any person or persons claiming by, through, or under them, or against the claim or claims of any other person or persons whomsoever.

In testimony whereof the said James Kinzie and Leah, his wife, have hereto set their hands and affixed their seals, at Chicago, the day and year first above written.

JAMES KINZIE. [SEAL.]
LEAH KINZIE. [SEAL.]

Signed, sealed, and delivered in the presence of—
JESSE WALKER.
E. A. BOND.
ENOCH DARLING.

195 STATE OF ILLINOIS, } ss:
Cook County, }

This day personally appeared before me, the undersigned, a justice of the peace in and for said county, James Kinzie and Leah Kinzie, wife of the said James, both personally known to said justice to be the real persons who executed the foregoing deed of conveyance, and

who then, before said justice, acknowledged that they signed, sealed, and delivered said deed freely and voluntarily for the uses and purposes therein mentioned.

And the said Leah, the wife of the said James, in a private examination by me, separate and apart from her said husband, declared that she executed the said deed freely and with her own consent, without fear or compulsion of her said husband.

Given under my hand and seal this 30th day of May, 1833.

ISAAC HARMON, *J. P.* [SEAL.]

Recorded May 31st, 1833.

RICH'D J. HAMILTON, *Rec.*

7. A deed from Julius J. B. Kingsbury to Simon B. Buckner, dated January 22, 1855, conveying in fee, for the consideration of $400,000, a part of the tract of land described in the preceding deed and described as follows: Commencing on Kinzie street, at a point seventy feet east from the east bank of the North Branch of the Chicago river, thence running northwesterly on a line seventy feet distance
196 from the east bank of the North Branch and parallel thereto, to the south line of Sedgwick's Addition to Chicago, being the north line of the tract described in the preceding deed, and extending far enough west to include all the lands owned by the grantor in said E. ½ N. W. ¼, sec. 9, — 39 N., — 14 E., aforesaid, and west of said line, which deed was recorded January 23d, 1855.

8. A certified copy of the paper purporting to be the will of Henry W. Kingsbury, deceased, and proof thereof from the corporation court of the city of Alexandria, in the State of Virginia, which reads as follows, to wit:

"Expecting soon to start upon a military expedition, where death may overtake me, I leave this as a record of my wishes respecting the disposition of my property:

"To my mother, Jane C. Kingsbury, I leave twenty thousand dollars, or so much of my Chicago property as upon fair appraisal may be valued at that amount.

"To my sister, Mary J. Buckner, I leave so much of the Chicago property held in my name as shall amount to one-third of the property in the city of Chicago, Ill., left by my father, Julius J. B. Kingsbury, deceased.

"To my cousin, John J. D. Kingsbury, I leave my property in Waterbury, Connecticut, and, in addition thereto, five thousand dollars, which I trust he will expend in completing his education. The remainder of my property of every description I leave to my
197 devoted wife, Eva. I desire, moreover, that the provisions of this will may be carried out so that the yearly income of my wife for her own personal support shall never be less than two thousand dollars ($2,000).

"As executors I name Ambrose E. Burnside, of Rhode Island, and Capt. John Taylor, com. dep't, U. S. Army.

"Signed at Fortress Monroe, Va., March 25th, 1862.

"HENRY W. KINGSBURY,

"*First Lieutenant 5th Reg't Artillery, U. S. Army.*"

STATE OF VIRGINIA:

Corporation Court of the City of Alexandria, May 9, 1870.

A writing purporting to be the last will and testament of Henry W. Kingsbury was produced in court by C. W. Wattles, and there being no subscribing witness thereto, S. B. Buckner and Charles H. Hatch were sworn and deposed that they are well acquainted with the testator's handwriting, and verily believe the said writing and the name thereto subscribed to be wholly written by the testator's own hand; whereupon the said writing is ordered to be recorded as the true and last will and testament of the said Henry W. Kingsbury, deceased;

and at a corporation court for the city of Alexandria con-
198 tinued and held on the 10th day of May, 1870, Ambrose E. Burnside, one of the executors named in the last will and testament of Henry W. Kingsbury, deceased, on motion of C. W. Wattles, has leave to qualify.

Whereupon he executed his bond, with James M. Stuart his security, in the penalty of five hundred dollars, conditioned according to law.

STATE OF VIRGINIA, }
Corporation Court of the City of Alexandria, } *ss:*

I, Morton Marye, clerk of the corporation court of the city of Alexandria, in the State of Virginia, do hereby certify that the foregoing is a true and complete copy of the last will and testament of Henry W. Kingsbury, deceased, and of the proof thereof before said court as the same appears of record in my office; and I further certify that the said will was duly executed and proved agreeably to the laws and usages of the State of Virginia, in which the same purports to have been executed.

In testimony whereof I have hereunto subscribed my
[SEAL.] name and affixed the seal of said court this 5th day of July, A. D. 1870.

MORTON MARYE, *Clerk.*

STATE OF VIRGINIA, }
Alexandria City, } *ss:*

I, Enoch M. Lowe, only judge of the corporation court of
199 the city of Alexandria, in the State of Virginia, do hereby certify that Morton Marye, who hath given the preceding certificate, is clerk of the said court, and that his attestation is in due form.

Given under my hand this 5th day of July, A. D. 1870.

E. M. LOWE,
Judge of the Corporation Court of the City of Alexandria.

9. A certified copy of same, together with the order of the county court of Cook county, Illinois, which reads as follows, to wit:

STATE OF ILLINOIS, } ss:
Cook County, }

I, John G. Gindele, clerk of the county court of Cook county, in the State aforesaid, do hereby certify that the annexed is a true and complete copy of the last will and testament of Henry W. Kingsbury, deceased, together with the proof thereof, before the corporation court of the city of Alexandria, Virginia, and the certificate authenticating the same, and of the order of the county court of Cook county, in the State of Illinois, in regard thereto as the same appears and remains of record in my office.

In testimony whereof I have hereunto set my hand and
[SEAL.] affixed the seal of said county court, at Chicago, in said county, this twenty-fifth day of July, A. D. 1870.

JOHN G. GINDELE, *Clerk.*

[Int. rev. stamp, 5c., cancelled.]

200 Expecting soon to start upon a military expedition, where death may overtake me, I leave this as a record of my wishes respecting the disposition of my property:

To my mother, Jane C. Kingsbury, I leave twenty thousand dollars, or so much of my Chicago property as upon fair appraisal may be valued at that amount.

To my sister, Mary J. Buckner, I leave so much of the Chicago property held in my name as shall amount to one-third of the property in the city of Chicago, Illinois, left by my father, Julius J. B. Kingsbury, deceased.

To my cousin, John J. D. Kingsbury, I leave my property in Waterbury, Connecticut, and, in addition thereto, five thousand dollars, which I trust he will expend in completing his education.

The remainder of my property of every description I leave to my devoted wife, Eva.

I desire, moreover, that the provisions of this will may be so carried out that the yearly income of my wife for her own personal support shall never be less than two thousand dollars ($2,000).

As executors I name General Ambrose E. Burnside, of Rhode Island, and Captain John Taylor, com. dep't, U. S. Army.

Signed at Fortress Monroe, Va., March 25th, 1862.

HENRY W. KINGSBURY,
1st Lieutenant 5th Reg't Artillery, U. S. Army.

201 STATE OF VIRGINIA:

Corporation Court of the City of Alexandria, May 9th, 1870.

A writing purporting to be the last will and testament of Henry W. Kingsbury was produced in court by C. W. Wattles, and there being no subscribing witness thereto, S. B. Buckner and Charles H. Hatch were sworn and deposed that they are well acquainted with the testator's handwriting, and verily believe the said writing and the name thereto subscribed to be wholly written by the testator's own hand.

Whereupon the said writing is ordered to be recorded as the true last will and testament of the said Henry W. Kingsbury, deceased; and at a corporation court for the city of Alexandria continued and held on the 10th day of May, 1870, Ambrose E. Burnside, one of the executors named in the last will and testament of Henry W. Kingsbury, deceased, on motion of C. W. Wattles, has leave to qualify.

Whereupon he executed his bond, with James M. Stewart his security, in the penalty of five hundred dollars, conditioned according to law.

STATE OF VIRGINIA,
Corporation Court of the City of Alexandria, } *ss:*

I, Morton Marye, clerk of the corporation court of the city of Alexandria, in the State of Virginia, do hereby certify that the foregoing is a true and complete copy of the last will and testa-
202 ment of Henry W. Kingsbury, deceased, and of the proof thereof before said court as the same appears of record in my office; and I further certify that the said will was duly executed and proved agreeably to the laws and usages of the State of Virginia, in which the same purports to have been executed.

In testimony whereof I have hereunto subscribed my
[SEAL.] name and affixed the seal of said court this fifth day of July, A. D. 1870.

MORTON MARYE, *Clerk.*

STATE OF VIRGINIA,
Alexandria City, } *ss:*

I, Enoch M. Lowe, only judge of the corporation court of the city of Alexandria, in the State of Virginia, do hereby certify that Morton Marye, who hath given the preceding certificate, is clerk of the said court, and that his attestation is in due form.

Given under my hand this fifth day of July, A. D. 1870.

E. M. LOWE,
Judge of the Corporation Court of the City of Alexandria.

STATE OF ILLINOIS,
Cook County, } *ss:*

Be it remembered that on this day, to wit, on the eleventh day of July, A. D. 1870, the same being one of the days of the July
203 term of the county court of Cook county—present thereat, Hon. M. R. M. Wallace, judge; Benj. L. Cleaves, coroner and *ex off.* sheriff; John G. Gindele, clerk—the following, among other, proceedings were by and before said court had and entered of record:

HENRY W. KINGSBURY ESTATE.

Ordered to put on record an authenticated copy of the will of deceased.

And now comes Ambrose E. Burnside, one of the executors named

in the will herein mentioned, by his attorneys, Gowdy & Chandler, and presents a copy of the last will and testament of Henry W. Kingsbury, deceased, and the proof thereof before the corporation court of the city of Alexandria, in the State of Virginia, with a certificate of the clerk of said court under the seal of said court; that the same is a true and complete copy of the last will and testament of Henry W. Kingsbury, deceased, and of the proof thereof before said court as the same appears of record in his office, and that the said will was duly executed and proved agreeably to the laws and usages of the State of Virginia, in which the same purports to have been executed, and with a certificate of the only judge of said court to the official character of said clerk, and that the attestation is in due form, and moves the court to admit the same to record.

204 And it appearing to the court that the said last will and testament of Henry W. Kingsbury, deceased, was executed and proved agreeably to the laws and usages of the State of Virginia, in which the same was executed, and that the copy of said will and the probate thereof is duly certified according to the law of the State of Illinois, and that said will touches and concerns real estate and other property in the State of Illinois—

It is by the court ordered that the said will and proof thereof, certified as aforesaid, be recorded, and that the same be treated and considered as good and available in law in like manner as wills made and executed in this State.

10. The letters executory issued by the corporation court of the city of Alexandria, in the State of Virginia, which reads as follows, to wit:

STATE OF VIRGINIA, } *To wit:*
City of Alexandria, }

Whereas H. W. Kingsbury, deceased, by his last will and testament did make, constitute, and ordain Gen'l Ambrose E. Burnside, of Rhode Island, and Capt. John Taylor, com. d'p't, U. S. Army, executors thereof, and at a corporation court held for the city of Alexandria, Va., before the judge of said court, on the ninth day of May, in the year 1870, the said last will and testament was proved according to law, and at a corporation court for the city of Alexandria,

205 Va., continued and held on the tenth day of May, in the year 1870, Ambrose E. Burnside, one of the said executors, having performed what the laws of this Commonwealth in that case require, certificate was granted him for obtaining a probate of the said will in due form.

Therefore, to the intent that the said will (a copy whereof is hereunto annexed) may be well and truly perform- —

I, E. M. Lowe, being the only judge of the said court, doth issue this probate and hereby authorize and empower the said Ambrose E. Burnside, executor as aforesaid, well and truly to collect and administer all and singular the goods, chattels, and credits of the said Henry W. Kingsbury, deceased, according to the true intent and meaning of the said will and according to law, hereby requiring the said exec-

utor to make and exhibit into the said corporation court a true and perfect inventory of the said goods, chattels, and credits, and also to make a just and true account of his actings and doings therein when thereto lawfully required.

Given under my hand and the seal of the said court this tenth day of May, in the year 1870.

E. M. LOWE,
Judge Corporation Court of the City of Alexandria, Va.

Teste: MORTON MARYE,
Clerk of the Corporation Court of the City of Alexandria, Va.

206 "Expecting soon to start upon a military expedition, where death may overtake me, I leave this as a record of my wishes respecting the disposition of my property:

"To my mother, Jane C. Kingsbury, I leave twenty thousand dollars, or so much of my Chicago property as upon fair appraisal may be valued at that amount.

"To my sister, Mary J. Buckner, I leave so much of the Chicago property held in my name as shall amount to one-third of the property in the city of Chicago, Ill., left by my father, Julius J. B. Kingsbury, deceased.

"To my cousin, John J. D. Kingsbury, I leave my property in Waterbury, Connecticut, and, in addition hereto, five thousand dollars, which I trust he will expend in completing his education.

"The remainder of my property of every description I leave to my devoted wife, Eva. I desire, moreover, that the provisions of this will may be carried out so that the yearly income of my wife for her own personal support shall never be less than two thousand dollars ($2,000).

"As executors I name Ambrose E. Burnside, of Rhode Island, and Capt. John Taylor, com. dep't, U. S. Army.

"Signed at Fortress Monroe, Va., March 25th, 1862.

"HENRY W. KINGSBURY,
"*First Lieutenant 5th Reg't Artillery, U. S. Army.*"

207 (A copy.)
Teste: MORTON MARYE,
Clerk of the Corporation Court of the City of Alexandria, Va.

11. The statutes of the State of Virginia. And it was stipulated and agreed that reference might be made to said statutes, printed by authority of the State, by either party, both in this court and the supreme court, the same as if they were copied at large in the record in this case.

12. A certified copy of an order from the county court of Cook county, Illinois, entered July —, 1870, showing that the complainant in the original bill had taken and perfected an appeal from the order of July 11, 1870, offered in evidence heretofore.

13. A map of the city of Chicago.

14. The following deposition of Simon B. Buckner, together with

the certified copy of the deed attached thereto from Simon B. Buckner and Mary K. Buckner to Henry W. Kingsbury, dated May 15th, 1861:

STATE OF ILLINOIS, } ss:
County of Cook, }

The People of the State of Illinois to George M. Davie, Esq., of the city of Louisville, county of Jefferson, State of Kentucky:

Whereas it has been represented to us that Simon B. Buckner is a material witness in a certain cause now depending in our
208 circuit court of Cook county, in and for the county of Cook aforesaid, between Henry W. Kingsbury, by his next friend, Corydon Beckwith, complainant, and Ambrose E. Burnside and other defendants to the bill, and Mary K. Buckner and Simon B. Buckner, complainants, and Henry W. Kingsbury and other defendants to the cross-bill, and that the said witness resides at Louisville aforesaid, without the said State of Illinois, and that his personal attendance cannot be procured at the trial of the said cause—

Now, know ye that we, in confidence of your prudence and fidelity, have appointed you commissioner to examine the said witness, and do therefore authorize and require you to cause the said witness to come before you at such time and place as you may therefore designate and appoint, and diligently to examine the said witness on the oath or affirmation of the said witness by you first duly in that behalf administered, and faithfully to take the deposition of the said witness upon all interrogatories inclosed with or attached to these presents, both on the part of the said plaintiffs and of the said defendants and none others, and the same, when thus taken, together with this commission and the said interrogatories, to certify unto our said circuit court of Cook county with the least possible delay.

Witness Norman T. Gassette, clerk of our said court, and seal thereof, in said county, this 29th day of November, A. D. 1870.

[L. S.] NORMAN T. GASSETTE, *Clerk.*

209 STATE OF ILLINOIS, } ss:
Cook County, }

In the Circuit Court of Cook County.

HENRY W. KINGSBURY, by His Next Friend, CRYDON BECKWITH,
vs.
AMBROSE E. BURNSIDE, JANE C. KINGSBURY, MARY J. Buckner, Simon B. Buckner, John J. D. Kingsbury, Eva Lawrence, and Albert G. Lawrence.
} Bill of Complaint. In Chancery.

MARY K. BUCKNER and SIMON B. BUCKNER
vs.
HENRY W. KINGSBURY, EVA LAWRENCE, ALBERT G. LAWRENCE, and JANE C. KINGSBURY.
} Cross-bill. In Chancery.

To the complainant in said original bill and the defendants to said cross-bill of complaint and their solicitors:

Take notice that on the thirtieth day of November, A. D. 1870, at 10 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, the undersigned will sue out of the office of the clerk of the circuit court of the county of Cook afore-
210 said *a dedimus protestatum* or commission under the seal of said court and directed to George M. Davie, Esq., of the city of Louisville, in the county of Jefferson and State of Kentucky, or to any judge or justice of the peace of the county and State last above mentioned, to take the deposition of Simon B. Buckner upon the interrogatories hereto attached to be read in evidence on the part of the complainants in said cross-bill and defendants to said original bill on the hearing of the above-entitled cause pending in the said circuit court on the chancery side thereof, when and where you can appear and file cross-interrogatories and join in said commission if you so wish.

Dated this twenty-second day of November, A. D. 1870.

GOUDY & CHANDLER,
Solicitors for said Complainants in said Cross-bill, &c.

We hereby acknowledge service of the foregoing notice and attached interrogatories by a copy thereof this twenty-second day of November, A. D. 1870, and consent that the commission may issue at the time named above, any long notice being hereby waived.

B. F. AYER,
Attorney for Albert G. and Eva Lawrence.
C. BECKWITH,
Guardian ad litem of Henry W. Kingsbury.

211 Interrogatories referred to in the foregoing notice and to be answered by Simon B. Buckner, a witness to be produced, sworn, and examined under and by virtue of the annexed commission, before George W. Davie, Esq., or any judge or justice of the peace of the county and State last mentioned, in the within notice in

the cause therein mentioned and referred to and now pending in the circuit court of Cook county, in the State of Illinois, wherein Henry W. Kingsbury is complainant in the original bill and Ambrose E. Burnside, Jane C. Kingsbury, Mary J. Buckner, Simon B. Buckner, John J. D. Kingsbury, Eva Lawrence, and Albert G. Lawrence are defendants thereto, and Mary K. Buckner and Simon B. Buckner are complainants in the cross-bill, and Henry W. Kingsbury, Eva Lawrence, Albert G. Lawrence, and Jane C. Kingsbury are defendants thereto, on the part and behalf of said complainants in said cross-bill, and defendants Ambrose E. Burnside, Jane C. Kingsbury, Mary J. Buckner, Simon B. Buckner, and John J. D. Kingsbury to said original bill, as follows, to wit:

Int. 1. What is your name, age, and place of residence? A.

Int. 2. Are you one of the defendants to the original bill and complainant in the cross-bill in this suit? A.

Int. 3. Are you acquainted with the other parties to this suit, or any of them; and, if so, how long have you known them respectively?

212 Int. 4. What relation, if any, do you bear to Mary K. Buckner, one of the complainants in said cross-bill, and when did that relation commence? A.

Int. 5. Were you or not acquainted with Julius J. B. Kingsbury in his lifetime; and, if yes, for how long before his death had you known him? A.

Int. 6. When did he die; *A.* and did he die testate or intestate? A.

Int. 7. State, if you know, what children the said Julius J. B. Kingsbury left him surviving at his death; *A.* and did he leave any descendants of children? A.

Int. 8. Were you or not acquainted with Henry W. Kingsbury, son of said Julius J. B. Kingsbury, in his lifetime; *A.* and, if yea, when did you first become acquainted with him and how intimately did you know him? A.

Int. 9. State whether or not prior to the death of said Julius J. B. Kingsbury you were in any manner connected with the management of his property in Chicago; *A.* and, if yea, state fully and particularly what such connection was and give a history thereof. A.

Int. 10. State whether or not you ever had at any time prior to his death any beneficial interest in any of said property or was the real owner thereof. A.

Int. 11. State the circumstances under which the deed dated January 22d, 1855, executed by Julius J. B. Kingsbury, conveying

213 a strip of the so-called "Kingsbury tract," seventy feet in width, along the east bank of the Chicago river, to you was executed. A.

Int. 12. What, if anything, was the consideration of that conveyance? A.

Int. 13. State, if you know, what was the object of that conveyance. A.

Int. 14. State whether or not subsequent to the death of said Julius J. B. Kingsbury you were in any manner connected with the management of the property which he left in Chicago; and, if so,

state particularly what that connection was and give a history thereof. A.

Int. 15. When did you cease to have the charge and management of said property? A.

Int. 16. After you ceased to have the direct charge and management of said property who succeeded you in the care thereof? A.

Int. 17. Under what arrangement did Ambrose E. Burnside take charge of said property; *A.* by whom made; *A.* and state fully the facts in regard thereto? A.

Int. 18. Where did you and your wife reside May 15, 1871? A.

Int. 19. Examine Exhibit A, attached to this commission, purporting to be a copy of a deed purporting to have been executed by yourself and said Mary K. Buckner, and state fully the circumstances under which the original deed of which said exhibit is a copy was executed. A.

Int. 20. Who prepared the same? A.

Int. 21. When and where was it executed? A.

214 Int. 22. Who was present? A.

Int. 23. Where was said Henry W. Kingsbury at the time of its execution? A.

Int. 24. How long prior to the time of its execution had you then last seen it; *A.* and when? A.

Int. 25. State whether or not you or said Mary K. Buckner had prior to the execution of said deed any understanding or arrangement with the said Henry W. Kingsbury about the execution of said deed or in presence of which said deed was executed. A.

Int. 26. Had you or said Mary K. Buckner any communication, either in person, by mail, or otherwise, with said Henry W. Kingsbury upon the subject of the execution of said deed to him prior to its execution; *A.* and, if yea, what communication? A.

Int. 27. What, if anything, was the consideration of said deed? A.

Int. 28. State whether or not any money or other consideration was paid to you or said Mary K. Buckner by said Henry W. Kingsbury or any other person for said deed? A.

Int. 29. Was there any bargain, sale, or gift of the premises described in said deed by you or your wife to Henry W. Kingsbury? A.

Int. 30. Where did you say Henry W. Kingsbury first learn- of the execution of said deed? A.

Int. 31. When did you next see him after the execution of said deed; *A.* and where? A.

215 Int. 32. When and where, if ever, did you first have any conversation with him about said deed, and state fully what was said? A.

Int. 33. Did you or not ever have any other conversation with him or make any other communication to or receive any other communication from him, either before or after the execution of said deed, in relation thereto? *A.* If yea, state the same fully and when it occurred? A.

Int. 34. What was the cause, object, and intent of the execution of the said deed by you? State the same fully. A.

Int. 35. State, if you know, what was the object, intent, and inducement of the execution of said deed by said Mary K. Buckner, and state what means of knowledge you had thereof at the time of said execution? A.

Int. 36. What, if anything, did you do with said deed after its execution? A.

Int. 37. Was it ever delivered to the said Henry W. Kingsbury? A.

Int. 38. What did you understand the value of the premises described in said deed, to wit, the undivided half of the Kingsbury tract and lots 5 and 6, block 35, original town of Chicago, was at the time of the execution of said deed? A.

Int. 39. State what other property than that described in said deed, if any, the said Mary K. Buckner was possessed of at the time of the execution of said deed *A.* and what its value was. A.

216 Int. 40. State what other property, if any, the said Henry W. Kingsbury then had *A.* and its value. A.

Int. 41. State whether or not you were present when the said deed was signed and acknowledged by said Mary K. Buckner. A.

Int. 42. For how long a time prior to the execution of said deed had you entertained the intention or purpose which you sought to carry out by its execution? A.

Int. 43. What was the relation of yourself and Mrs. Buckner with said Henry W. Kingsbury at the time of the execution of said deed, and what had there been prior thereto? A.

Int. 44. State whether or not after the execution of said deed said Henry W. Kingsbury made any claim to the premises described in said deed or exercised any acts of ownership over the same; and, if so, what claim or what acts. A.

Int. 45. What change, if any, took place in the management of said property or the manner in which the rents and profits thereof were disposed of upon or after the examination of said deed? A.

Int. 46. What part, if any, had the said Henry W. Kingsbury ever taken in the management of the said property to your knowledge prior to the 25th of March, 1862? A.

Int. 47. In what manner had the income derived therefrom, subsequent to the death of the said Julius J. B. Kingsbury and

217 before March 25th, 1862, been disposed of? A.

Int. 48. Where and in what manner was the life of Henry W. Kingsbury passed? A.

Int. 49. Give the full name of Mrs. Buckner before her marriage. A.

Int. 50. When, from whom, and under what circumstances did you first learn that said Henry W. Kingsbury left any will or writing purporting to be his last will and testament? A.

Int. 51. State, if you know, to what congressional district said Henry W. Kingsbury was credited upon his appointment as a cadet at West Point. A.

Int. 52. If you know of anything further which would be of advantage to the complainants in the cross-bill and the defendants to the original bill of complaint in this cause, state the same fully. A.

Int. 53. State whether there was any child or children issue of your marriage with Mrs. Buckner; and, if yea, state when the same was or were born, and state whether the same is or are now living. A.

GOUDY & CHANDLER,
Solicitors, etc.

(Book 212 of Deeds, page 624.)

Be it known that Simon B. Buckner and Mary K. Buckner,
218 his wife, of the city of Louisville and State of Kentucky, in consideration of the sum of one dollar in hand paid and the natural love and affection we bear to our brother, Henry W. Kingsbury, do hereby grant, bargain, sell, and convey to said Henry W. Kingsbury, of the United States Army, his heirs and assigns forever, the following property, viz:

One undivided half of lots number five (5) and six (6), in block number thirty-five (35), in the original town of Chicago, in the county of Cook and State of Illinois, and also all of our right, title, and interest in the Kingsbury tract, so called, being the tract of thirty-five acres, more or less, purchased from James Kinzie by the late Major Julius J. B. Kingsbury, of the U. S. Army, as per deed of said Kinzie, on record in the clerk's office of Cook county, Illinois, the said tract being the south half of what remained of the northwest quarter of section nine, in township thirty-nine, range fourteen, in said Cook county, Illinois, after deducting therefrom the town of Waubansia. The other interest in said land and tenements, etc., included in this deed now belongs to said Henry W. Kingsbury, as one of the heirs of the late Major J. J. B. Kingsbury, and the entire property being subject to the dower interest of *his* Jane C. Kingsbury:

To have and to hold the same to the said grantee, his heirs and assigns forever, the grantors covenanting that they will warrant the property hereby conveyed.

219 In witness whereof we have hereunto set our hands and seals at Louisville this fifteenth day of May, 1861.

SIMON B. BUCKNER. [SEAL.]
MARY K. BUCKNER. [SEAL.]

STATE OF KENTUCKY, } *sct:*
County of Jefferson, }

Be it remembered that on this 15th day of May, A. D. 1861, before me, C. L. Thommason, a notary public in and for said State and county, duly commissioned and qualified, appeared Simon B. Buckner and Mary K. Buckner, his wife, who are personally known to me to be the persons whose names are subscribed to the foregoing deed as having executed the same, and acknowledged that they had executed the same for the uses and purposes therein expressed.

And the said Mary K. Buckner, wife of the said Simon B. Buckner, being of lawful age and having been by me, separate and apart from her said husband, examined and the contents of the said deed

fully made known and explained to her, acknowledged that she had executed the same and relinquished her dower to the lands and tenements therein mentioned voluntarily and without compulsion of her said husband.

In witness whereof I have hereunto set my hand and
[SEAL.] affixed my official seal this fifteenth day of May, A. D. 1861.

220 C. S. THOMMASON,
Notary Public for Jefferson County, State of Kentucky.

No. 44987. Filed May 17th, 1861.

STATE OF ILLINOIS, } ss:
County of Cook. }

I, Norman T. Gassette, clerk of the circuit court and *ex officio* recorder in and for said county, in the State aforesaid, do hereby certify that the annexed is a true copy of the record of a certain instrument filed in my office on the 17th day of May, A. D. 1861, and recorded in Book No. 212 of Deeds, on page 624.

In testimony whereof I have hereunto set my hand and
[L. S.] affixed the seal of our said court, at Chicago, this 23rd day of November, A. D. 1870.

NORMAN T. GASSETTE,
Clerk of the Circuit Court and ex Officio Recorder of Cook County.

Counsel for Mrs. Eva Lawrence, one of the defendants to the original bill and to the cross-bill in this cause, object to direct interrogatories numbered 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, and 48, propounded to Simon B. Buckner, and to each of them severally, as im-
221 material and incompetent, and propose the following cross-interrogatories to be answered by the said witness:

Cross-interrogatory 1. Were you or not, at the time of the execution of the deed referred to in direct interrogatory 19, a citizen of the State of Kentucky? If yea, how long had you then been a citizen of that State? A.

Cross-int. 2. Did you at the time referred to in the preceding cross-interrogatory hold any official position in the State of Kentucky? *A.* If yea, what position? *A.* And if you held more than one office, state what offices you held and for how long a term you had then held any such office or offices. A.

Cross-int. 3. Had you been at any time previous to the year 1861 connected with the United States Military Establishment? *A.* If yea, state when and where and how that connection first commenced, how long continued, what positions you held during that time in the Army of the United States, and when you retired from the Army. A.

Cross-int. 4. If you shall state in answer to cross-interrogatory 2 that you were the adjutant general of the State of Kentucky in May, 1861, state when you were appointed or elected to said office, *A.* by

whom you were so appointed or elected, *A.* and for how long a time you were chosen.

Cross-int. 5. Did you continue to hold and exercise said office of adjutant general until the expiration of the term for which
222 you were chosen, or how otherwise? *A.* If not, when did you cease to officiate as such officer and what — the cause or inducement which led to your withdrawal from that service? A.

Cross-int. 6. Were you or not connected with the Confederate military service during the late civil war? *A.* If yea, when did you first enter that service and where? *A.* And how long did you remain connected with that service, what positions did you occupy during the war, and how and by whom or by what authority were you appointed to these positions? A.

Cross-int. 7. Did you or not in the spring or summer of 1861 visit the city of Washington? *A.* If yea, when did you arrive there, *A.* how long did you remain there or in that vicinity, *A.* and when did you return to the State of Kentucky?

Cross-int. 8. How long did you remain at your home in Louisville and how long within the Union lines, so called, after your return from Washington in the summer of 1861? *A.* And where did you — afterwards? *A.* Did you abandon your residence at Louisville? *A.* If yea, did your family, or any or what portion of it, accompany or follow you? *A.*

Cross-int. 9. Did you ever inform the late Henry W. Kingsbury of the purpose or object you had in view in the execution of the deed referred to in direct interrogatory 19? *A.* If so, when and where? A.

Cross-int. 10. When and where did you last see the said Henry W. Kingsbury?

223 Cross-int. 11. To whom did you ever communicate the intention you sought to carry out by the execution of the deed above referred to at any time prior to the date of said deed? *A.* When and where was it that such intention was expressed? *A.* Did any one know that you entertained such an intention, so far as you are aware, before the deed was executed? *A.* If so, who, *A.* and how and when were they apprised of it? A.

Cross-int. 12. Did or not Mrs. Lawrence or some one in her behalf or otherwise, after the late Henry W. Kingsbury's death, send you information in relation to the writing executed by him at Fortress Monroe purporting to be of the nature of a last will and testament? *A.* If so, when and where did you receive that information? A.

Cross-int. 13. Where were you and your family at the time of the said Henry W. Kingsbury's death? *A.* Were there at that time any regular postal communication between the place of Mrs. Lawrence's residence and the section of country where you then were? A.

Cross-int. 14. How long were such postal communications interrupted, *A.* and when for the first time after the said Henry W. Kingsbury's death were you in a position to receive and send freely communications by post from and to Mrs. Lawrence? A.

Cross-int. 15. When and from where did you first receive a copy

fully made known and explained to her, acknowledged that she had executed the same and relinquished her dower to the lands and tenements therein mentioned voluntarily and without compulsion of her said husband.

In witness whereof I have hereunto set my hand and
[SEAL.] affixed my official seal this fifteenth day of May, A. D. 1861.

220 C. S. THOMMASON,
Notary Public for Jefferson County, State of Kentucky.

No. 44987. Filed May 17th, 1861.

STATE OF ILLINOIS, } ss:
County of Cook. }

I, Norman T. Gassette, clerk of the circuit court and *ex officio* recorder in and for said county, in the State aforesaid, do hereby certify that the annexed is a true copy of the record of a certain instrument filed in my office on the 17th day of May, A. D. 1861, and recorded in Book No. 212 of Deeds, on page 624.

In testimony whereof I have hereunto set my hand and
[L. S.] affixed the seal of our said court, at Chicago, this 23rd day of November, A. D. 1870.

NORMAN T. GASSETTE,
Clerk of the Circuit Court and ex Officio Recorder of Cook County.

Counsel for Mrs. Eva Lawrence, one of the defendants to the original bill and to the cross-bill in this cause, object to direct interrogatories numbered 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, and 48, propounded to Simon B. Buckner, and to each of them severally, as im-
221 material and incompetent, and propose the following cross-interrogatories to be answered by the said witness:

Cross-interrogatory 1. Were you or not, at the time of the execution of the deed referred to in direct interrogatory 19, a citizen of the State of Kentucky? If yea, how long had you then been a citizen of that State? A.

Cross-int. 2. Did you at the time referred to in the preceding cross-interrogatory hold any official position in the State of Kentucky? *A.* If yea, what position? *A.* And if you held more than one office, state what offices you held and for how long a term you had then held any such office or offices. A.

Cross-int. 3. Had you been at any time previous to the year 1861 connected with the United States Military Establishment? *A.* If yea, state when and where and how that connection first commenced, how long continued, what positions you held during that time in the Army of the United States, and when you retired from the Army. A.

Cross-int. 4. If you shall state in answer to cross-interrogatory 2 that you were the adjutant general of the State of Kentucky in May, 1861, state when you were appointed or elected to said office, *A.* by

whom you were so appointed or elected, *A.* and for how long a time you were chosen.

Cross-int. 5. Did you continue to hold and exercise said office of adjutant general until the expiration of the term for which
222 you were chosen, or how otherwise? *A.* If not, when did you cease to officiate as such officer and what — the cause or inducement which led to your withdrawal from that service? A.

Cross-int. 6. Were you or not connected with the Confederate military service during the late civil war? *A.* If yea, when did you first enter that service and where? *A.* And how long did you remain connected with that service, what positions did you occupy during the war, and how and by whom or by what authority were you appointed to these positions? A.

Cross-int. 7. Did you or not in the spring or summer of 1861 visit the city of Washington? *A.* If yea, when did you arrive there, *A.* how long did you remain there or in that vicinity, *A.* and when did you return to the State of Kentucky?

Cross-int. 8. How long did you remain at your home in Louisville and how long within the Union lines, so called, after your return from Washington in the summer of 1861? *A.* And where did you — afterwards? *A.* Did you abandon your residence at Louisville? *A.* If yea, did your family, or any or what portion of it, accompany or follow you? *A.*

Cross-int. 9. Did you ever inform the late Henry W. Kingsbury of the purpose or object you had in view in the execution of the deed referred to in direct interrogatory 19? *A.* If so, when and where? A.

Cross-int. 10. When and where did you last see the said Henry W. Kingsbury?

223 Cross-int. 11. To whom did you ever communicate the intention you sought to carry out by the execution of the deed above referred to at any time prior to the date of said deed? *A.* When and where was it that such intention was expressed? *A.* Did any one know that you entertained such an intention, so far as you are aware, before the deed was executed? *A.* If so, who, *A.* and how and when were they apprised of it? A.

Cross-int. 12. Did or not Mrs. Lawrence or some one in her behalf or otherwise, after the late Henry W. Kingsbury's death, send you information in relation to the writing executed by him at Fortress Monroe purporting to be of the nature of a last will and testament? *A.* If so, when and where did you receive that information? A.

Cross-int. 13. Where were you and your family at the time of the said Henry W. Kingsbury's death? *A.* Were there at that time any regular postal communication between the place of Mrs. Lawrence's residence and the section of country where you then were? A.

Cross-int. 14. How long were such postal communications interrupted, *A.* and when for the first time after the said Henry W. Kingsbury's death were you in a position to receive and send freely communications by post from and to Mrs. Lawrence? A.

Cross-int. 15. When and from where did you first receive a copy

of the writing referred to in cross-interrogatory 12, *A.* and
224 when and by whom were you first informed of the contents of said writing or its substance and purport? *A.* Where were you resident at that time, *A.* and have you or not since then continued to reside uninterruptedly in the United States? A.

Cross-int. 17. Please state specifically what portions, if any, of the real estate of the late Julius J. B. Kingsbury left by him at his decease were sold or disposed of by his legal representatives after his decease and prior to the death of his son, the late Henry W. Kingsbury. Please give the dates and particulars of all such alienations, including the names of the purchasers and price received and a general description of the property sold in each instance. A.

Cross-int. 18. Please state whether you or your wife have received any portion of the proceeds of the sales inquired of in the previous cross-interrogatory. *A.* If yea, what sums have been so received by you or her and when were they so received? A.

B. F. AYER,
Solicitor for Eva Lawrence.

Cross-interrogations upon the part of the complainant- on the said cross-bill and the defendants (except Eva Lawrence and Albert G. Lawrence) to the original bill — to the new matter inquired about in the cross-interrogatories on the part of Eva Lawrence.

225 1. State the reason why you retired from the United States Army previous to the year 1861.

2. For how long a time before you entered the Confederate military service did you have any purpose or intention of so doing?

3. Had you any such intention at or before the time of the execution of the deed of May 15th, 1861, to Henry W. Kingsbury?

4. State whether or not the condition of the country had any influence in the making of said deed of May 15th, 1861; and, if so, what.

5. State whether or not said deed was made with any view of your entering the Confederate military service.

6. If your visit to Washington in the summer of 1861 had any reference to matters in controversy in this suit, you may state fully the facts in regard to the same.

7. How does the account between yourself and your wife or your wife and the estate of the late Henry W. Kingsbury stand, taking into consideration the proceeds of sales inquired about in cross-interrogatory on the part of the defendant, Eva Lawrence, and the rents and profits received from the property of the late Julius J. B. Kingsbury and the payments made by you or your wife or both?

8. If you know of any other matter of advantage to the complainants in the said cross-bill in this suit, state the same fully.

GOUDY & CHANDLER,
Solicitors, &c., &c.

226 The deposition of Simon B. Buckner, of the county of Jefferson, State of Kentucky, a witness of lawful age, produced, sworn, and examined upon his corporal oath on the 15th day of December, in the year of our Lord eighteen hundred and seventy, at the office of George M. Davie, in the city of Louisville, in the county and State aforesaid, by me, the said George M. Davie, a commissioner duly appointed by a *dedimus potestatum* or commission issued out of the clerk's office of the circuit court of Cook county, in the State of Illinois, bearing teste in the name of Norman T. Gassette, clerk of said circuit court, with the seal of said court affixed thereto, and to me directed as such commissioner, for the examination of the said S. B. Buckner, a witness in a certain suit and matter in controversy now pending and undecided in the said circuit court, wherein Henry W. Kingsbury, by his next friend, Corydon Beckwith, is plaintiff, and Ambrose E. Burnside, Mary J. Buckner, Simon B. Buckner, Jane C. Kingsbury, John J. D. Kingsbury, Eva Lawrence, and Albert G. Lawrence are defendants, in behalf of the said Mary J. Buckner and Simon B. Buckner, as well *as* upon the cross-interrogatories of Eva Lawrence as on the interrogatories of the said Mary K. Buckner and S. B. Buckner, and upon the cross-bill of the said Mary K. Buckner and Simon B. Buckner in said suit, complainants, against Henry W. Kingsbury, Eva Lawrence, Albert G. Lawrence, and Jane C. Kingsbury, defendants to said cross-bill, in behalf of said complainants in said cross-bill, which were attached to and inclosed with the said commission, and upon none others.

227 The said S. B. BUCKNER, being first sworn by me as a witness in the said cause, previous to the commencement of his examination, to testify the truth, as well on behalf of the plaintiff in the original bill as the defendants thereto, and as well on behalf of the defendants to the cross-bill as of the plaintiffs to the same, in relation to the matters in controversy between the said plaintiffs and defendants, so far as he should be interrogated, testified and deposed as follows:

Int. 1. What is your name, age, and residence?

Answer to Int. 1. My name is Simon Bolivar Buckner; my age, 47 years; I reside in Louisville, Kentucky.

Int. 2. Are you one of the defendants to the original bill and a complainant in the cross-bill in this suit?

Answer to Int. 2. I am.

Int. 3. Are you acquainted with the other parties to this suit or any of them; and, if so, how long have you known them respectively?

Answer. I am acquainted with Mary K. or J. Buckner, Jane C. Kingsbury, Ambrose E. Burnside, Eva Lawrence, and John J. D. Kingsbury. I have known the first and second named parties since 1844; the third named I have known since 1841; the fourth I have known since 1857 or 1858, and the fifth I have known since about 1858.

Int. 4. What relation, if any, do you bear to Mary K. Buckner,

one of the complainants in said cross-bill, and when did that
228 relation commence?

Answer. I am her husband. We were married May 2nd, 1850.

Int. 5. Were you or not acquainted with Julius J. B. Kingsbury in his lifetime; and, if yes, for how long before his death had you known him?

Answer. I was acquainted with him in his lifetime. I knew him for nearly twelve years previous to his death.

Int. 6. When did he die, and did he die testate or intestate?

Answer. He died in June, 1856. He died intestate.

Int. 7. State, if you know, what children the said Julius J. B. Kingsbury left him surviving at his death, and did he leave any descendants of children?

Answer to 7 Interrogatory. He left a daughter, Mary J. Buckner, my wife, and a son, Henry W. Kingsbury, neither of whom had living descendants at the time of his death.

Int. 8. Were you or not acquainted with Henry W. Kingsbury, son of said Julius J. B. Kingsbury, in his lifetime; and, if yea, when did you first become acquainted with him and how intimately did you know him?

Answer to 8 Interrogatory. I have known Henry W. Kingsbury from his early boyhood in 1844; our intimacy was that of an older and younger brother.

Int. 9. State whether or not, prior to the death of said
229 Julius J. B. Kingsbury, you were in any manner connected with the management of his property in Chicago; and, if yea, state fully and particularly what such connection was, and give a history thereof.

Answer to 9 interrogatory. I was connected with the management of his property in Chicago prior to his death. I was the agent for the management of his whole estate in Illinois, dating from March, 1855, under a general power of attorney, which was recorded in the office of the recorder of deeds in Chicago, Illinois, the original — which was in my possession, but is now lost. Being on a leave of absence from my military duties, and on a visit to my father-in-law's family, in Detroit, I accompanied Major J. B. Kingsbury, at his request, to Chicago. A few days after our arrival there, I think in January or February, 1855, he proposed to me to resign my commission in the United States Army and take charge, as his agent, of all his business in Chicago, offering me a salary as a compensation for relinquishing my position in the army. On his urgent and repeated solicitations I complied with his request, resigned my commission in the United States Army, and entered upon my duties as his agent in Chicago. The authority under which I acted was a full power of attorney from Major J. B. Kingsbury, authorizing leases, loans, and improvements on his property in Chicago.

Int. 10. State whether or not you ever had, at any time prior to his death, any beneficial interest in any of said property, or was the real owner thereof.

230 Answer to Int. 10. I had no beneficial interest and was not the real owner of any of it.

Int. 11. State the circumstances under which the deed dated January 22d, 1854, executed by said Julius J. B. Kingsbury, conveying a strip of the so-called "Kingsbury tract," seventy-five feet in width along the east bank of the Chicago river, to you was executed.

Answer to Int. 11. A proposition was pending in the common council of Chicago to widen the North Branch of the Chicago river. It was supposed to be the intention of those who favored the proposition to require the river to be widened by cutting off a large part of the water front of Major Kingsbury's property without granting compensation therefor. To meet what was thought to be an act of injustice, Major Kingsbury, under the advice of counsel, conveyed to me the entire water front of the "Kingsbury tract," so called, to the depth of seventy feet from the water line. I was a trustee only of this property, and it has always been my purpose to fulfill the trust by restoring this property at the proper time to the estate. That property was conveyed to me by an absolute deed, with no reservation or trust expressed; but, in truth and honesty, it was for the benefit of Major Kingsbury and, if he should die, for his children. No writing was given by me declaring the trust, and the performance of the duty rested, without evidence, solely with my integrity.

I had Major Kingsbury's confidence; he had my word. The
231 deed I made in 1861 to Henry Kingsbury, although absolute on its face, was for the benefit of his sister, my wife, and by that very deed I fulfilled my word to Major Kingsbury, and executed the private trust by conveying to Henry Kingsbury the very property for which I held an absolute deed. His widow and heir now hold his interest in that property by my performance of a private trust, of which there was no evidence but my faith.

Int. 12. What, if anything, was the consideration of that conveyance?

Ans. to Int. 12. There was no consideration whatever except that stated in my answer to the 11th interrogatory.

Int. 13. State, if you know, what was the object of that conveyance.

Answer to Int. 13. I have fully answered this question in my answer to the 11th interrogatory. I refer to that answer as my answer to this.

Int. 14. State whether if not subsequent to the death of the said Julius J. B. Kingsbury you were in any manner connected with the management of the property which he left in Chicago; and, if so, state what that connection was and give a history thereof.

Answer to Int. 14. After the death of J. J. B. Kingsbury, in 1856, I continued to occupy the same relation as general agent for the management of his estate that I occupied towards him when living. It was the desire of his widow, of Henry W. Kingsbury, his son, and of my wife that I should so continue. No change, therefore,
232 occurred in the management of the estate, but I continued to act as before with the full assent and at the request of Mrs. Jane C. Kingsbury and both of Major Kingsbury's children.

Int. 15. When did you cease to have the charge and management of said property?

Answer to Int. 15. I did not cease to have general control and management of the property in question until August or September, 1861, but before the termination of this agency there had been one or two changes in the mode of conducting the agency.

Int. 16. After you ceased to have direct charge and management of said property who succeeded you in the care thereof?

Answer to Int. 16. General Ambrose E. Burnside.

Int. 17. Under what management did Ambrose E. Burnside take charge of said property—by whom made? And state fully the facts in regard thereto.

Answer to Int. 17. In 1857 I resumed my residence in Kentucky. In consequence of my absence from Chicago much of the time, and of the fact that extensive improvements were in progress on the property, I procured the assistance of General Ambrose E. Burnside to supervise the business in my absence. From the summer or autumn of, I think, 1858 much of the business was conducted through him. After the completion of these improvements it was thought that the income from the estate for one or two years might be insufficient to meet accrued and accruing liabilities. In conse-
233 quence of this a more distinct arrangement was made with General Burnside—I think late in 1859 or early in 1860—in which it was stipulated that should there be any such deficiency the necessary sums were to be advanced by said Burnside until the supposed increase of its income would enable the estate to discharge its indebtedness to him. The particular details of this arrangement I do not recollect, but he was thereby thrown more closely in the business management of the estate, but I did not consider my supervising control withdrawn. Henry W. Kingsbury and my wife, represented by me, were parties to this arrangement. I believe Mrs. Jane C. Kingsbury also was, but I am not certain.

Int. 18. Where did you and your wife reside May 15th, 1861?

Answer to Int. 18. We resided in Louisville, Jefferson county, Kentucky.

Int. 19. Examine "Exhibit A" attached to this commission, purporting to be a copy of a deed purporting to have been executed by yourself and said Mary K. Buckner, and state fully the circumstances under which the original deed, of which said exhibit is a copy, was executed.

Answer to Int. 19. I appeared to be the owner of a part of the property known as the "Kingsbury tract," on the Chicago river, by a deed made to me by Major Julius J. B. Kingsbury in his lifetime, but was in fact only a trustee for the heirs, and I had some interest as husband in the share of my wife in the property in
234 Chicago, descended from her father, and I had intended for a long time before the deed marked "Exhibit A" was made to divest myself of all such interest for the benefit of my wife. The disturbed condition of the country and the uncertainty of future events in May, 1861, induced me to put in execution such intention at that time without further delay. I accordingly consulted with my

wife and determined to convey her title and interest, together with the property or title held in my name, to her brother, with the view of having an undivided half of all the real estate situated in Chicago and which formerly belonged to Major Kingsbury conveyed to my wife or in such way to give her the full control and benefit of all of her estate derived from her father free from any interest of mine. The deed was made in pursuance of such purposes and no other and with the full expectation that it would be accomplished in such way as might be directed by my wife. My wife and myself both had implicit confidence in her brother, and were on the most intimate and affectionate terms with him, and the idea that any advantage would be taken of the conveyance to him did not enter our minds.

There was no particular time or manner when and how the deed should be made by her brother discussed or fixed, because we were satisfied that my wife's interest would be safe in his hands, and that he would act in the proper way to please my wife. I consulted with Wm. F. Barrett, Esq., an attorney in Louisville, who was a
235 particular friend, with regard to the matter, and he prepared the deed and was present, I think, when it was executed. This deed was made at the time of its date at Louisville, Ky., and was sent by me to D. W. Mitchell, of Chicago, Ills., who was the agent in charge of the property, with directions to file the same for record. There was no personal delivery of the deed by me or my wife, unless the fact just stated was such a delivery. I do not mean to say there was any arrangement with my wife's brother in regard to my making said deed, but we were satisfied, from our knowledge of his character, that he would assent to any suggestion that might be made by my wife or myself with regard to her property. The troubled condition of the country was the occasion, not the cause, of the conveyance. It had been contemplated and determined on long before, and the national troubles only reminded me of the delay in accomplishing a previous purpose. That purpose was that my wife should be the sole beneficiary of her inheritance, and to accomplish that and that alone I made the conveyance. I was then owner of the lands in possession, lying in Hart county, Kentucky, worth fully forty thousand dollars. I did not convey them, because they were my own, my sole object being to insure my wife her inheritance, and not to secure myself against any misfortunes of the future. I likewise owned a residence in the city of Louisville worth more than twenty thousand dollars. That was not conveyed,
236 because it was mine and constituted no part of what I conceived it to be my duty to wife to convey. I also had lands in Minnesota worth five thousand dollars belonging to me in my own right. I did not convey that either, but retained it until after the war, when I sold part of it. I should have stated in answer to the eleventh interrogatory that I did not execute the private trust existing between Major Kingsbury and me sooner than May, 1861, because there was a suit in Chicago with reference to the bank of the Chicago river opposite to the trust property which I held, and which suit might affect the property I held, and I was advised by

your legal counsel not to reconvey until the termination of that suit. I followed that advice until May, 1861, and then made the conveyance to Henry W. Kingsbury, determining to disengage myself from any interest in the estate of my wife and to execute any trust or duty I owed. I did not even let them know whether that suit had been determined.

Int. 20. Who prepared the same?

Answer to Int. 20. William F. Barrett, of Louisville, Kentucky.

Int. 21. When and where was it executed?

Answer to Int. 21. In Louisville, Ky., May 15, 1861.

Int. 22. Who was present?

Answer to Int. 22. My wife and I and, I think, Mr. W. F. Barrett.

237 Int. 23. Where was said Henry W. Kingsbury at the time of the execution?

Answer to Int. 23. Either at the United States Military Academy, at West Point, New York, or in Washington city. I am not certain at which place.

Int. 24. How long prior to the time of the execution had you last seen him, and where?

Answer to Int. 24. I had last seen him at West Point; the exact time I do not remember; it was some months before the execution of the deed. I think not later than the previous December or January.

Int. 25. State whether or not you or said Mary K. Buckner had prior to the execution of said deed any understanding, arrangement, or agreement with said Henry W. Kingsbury about the execution of said deed or in pursuance of which said deed was executed?

Ans. to Int. 25. We had none.

Int. 26. Had you or said Mary K. Buckner any communication, either in person or mail or otherwise, with said Henry W. Kingsbury upon the subject of the execution of said deed to him prior to its execution; and, if yea, what communication?

Answer to Int. 26. I have no recollection of any whatever. I am sure there was none.

Int. 27. What, if anything, was the consideration of said deed?

Answer to Int. 27. There was no consideration for it.

238 Int. 28. State whether or not any money or other consideration was paid to you or said Mary K. Buckner by said Henry W. Kingsbury or any other person for said deed.

Answer to Int. 28. Nothing whatever was paid to either of us by any one.

Int. 29. Was there any bargain, sale, or gift of the premises described in said deed by you or your wife to Henry W. Kingsbury?

Answer to Int. 29. There was not.

Int. 30. When did said Henry W. Kingsbury first learn of the execution of said deed?

Answer to Int. 30. About the 7th or 8th of July, 1861, is the first time of his learning it, so far as I know and believe, and even then he did not learn from me the particulars of the transaction.

Int. 31. When did you next see him after the execution of said deed, and where?

Answer to Int. 31. I first saw him in Washington city on the evening of July 4th, 1861. I saw him there several times between that evening and about the 9th of the same month, when I left Washington city.

Int. 32. When and where, if ever, did you first have any conversation with him about said deed? And state fully what was said.

Answer to Int. 32. I met Henry W. Kingsbury in Washington city in July, 1861. I reached that place on the 4th of July of that year and left on or before the 9th of the same month. Henry was there in Washington or near there, on the staff of Gen'l McDowell, and I met him three or four times, I think, while I was there.

239 There was nothing said about the property in Chicago at the first or second interviews. At the third or fourth interview we were walking on the street near the President's House, and he was talking of the troubles in the country, when I remarked to him, "By the way, the property of your sister has been deeded to you and I want you to look after her interests and see that she has her property;" and he remarked, "That was all right or very well," or some words to that effect. This is the substance of the conversation. That was the only conversation I ever had with him on the subject, and I never met him after the deed was made except on that visit to Washington city.

Int. 33. Did you or not ever have any other conversation with him or make any other communication to or receive any other communication from him, either before or after the execution of said deed, in relation thereto? And, if yea, state the same fully and where it occurred.

Answer to Int. 33. None whatever, that I can remember.

Int. 34. What was the cause, object, and intent of the execution of said deed? State the same fully.

Answer to Int. 34. I have replied fully to this question in my answer to interrogatories Nos. 11 and 19. I refer to those answers and make them my answers to this interrogatory.

Int. 35. State, if you know, what was the object, intent, and

240 inducement of the execution of said deed by said Mary K. Buckner, and state what means of knowledge you had thereof at the time of said execution.

Answer to Int. 35. They were the same that induced the execution of the deed by me, as stated in my replies to interrogatories Nos. 11 and 19. I know this from conversations with her at different times before the execution of the deed, some of which conversations occurred many months before the execution of the deed, and some, I think, two or three years before. There had been for some years a friendly contest between my wife and me with reference to her inheritance. Her wish was that I should have a larger interest than my marital rights gave me, and my wish was that she should be beneficiary of the estate descended from her father. I do not mean to say that my wife's desire to give a larger interest than I had as husband caused the delay of a conveyance for her sole benefit, be-

cause I believe that if at any moment I had been positive or mandatory she would have yielded; but I do say that as soon as she gave her willing consent, in May, 1861, I caused the conveyance to be made; and I further say that I would have insisted upon the consent sooner than May, 1861, had it not been for the embar-assments of the estate, one of which grew out of the effort to appropriate the river-bank property, to prevent which the deed of Major Kingsbury to me above referred to was made.

Int. 36. What, if anything, did you do with said deed after its execution?

241 Answer to Int. 36. I sent it to D. W. Mitchell, my agent for collecting rents of the estate in Chicago.

Int. 37. Was it ever delivered to Henry W. Kingsbury?

Answer to Int. 37. No.

Int. 38. What did you understand the value of the premises described in said deed, to wit, the undivided half of the Kingsbury tract and lots 5 and 6, block 35, original town of Chicago, was at the time of the execution of said deed?

Ans. to Int. 38. I estimated the value of my wife's interest at about five hundred thousand dollars at that time.

Int. 39. State what other property than that described in said deed, if any, the said Mary K. Buckner was possessed of at the time of the execution of said deed, and what its value was.

Answer to Int. 39. The only other property she owned was an undivided half of her father's property in Waterbury, Connecticut, subject to her mother's right of dower. Its estimated value was about three thousand or thirty-five hundred dollars. It yielded no income to her.

Int. 40. State what other property, if any, the said Henry W. Kingsbury then had, and its value.

Answer to Int. 40. He had only the remaining undivided half of his father's property in Waterbury, Connecticut, subject to his

242 mother's right of dower. Its estimated value was about three thousand or thirty-five hundred dollars.

Int. 41. State whether or not you were present when the said deed was signed and acknowledged by the said Henry W. Buckner?

Answer to Int. 41. Yes; I was present.

Int. 42. For how long a time prior to the execution of said deed had you entertained the intention or purpose which you sought to carry out by its execution?

Answer to Int. 42. For several years.

Int. 43. What were the relations of yourself and Mrs. Buckner with the said Henry W. Kingsbury at the time of the execution of said deed, and what had they been prior thereto?

Answer to Int. 43. They were then and had ever been of the most confiding and affectionate character.

Int. 44. State whether or not, after the execution of said deed, said Henry W. Kingsbury made any claim to the premises described in said deed or exercised any acts of ownership over the same; and, if so, what claim and what acts?

Answer to Int. 44. He made no claim to them whatever that I know

of or that I have ever heard of, nor do I believe that he ever claimed them.

Int. 45. What change, if any, took place in the management of said property or the manner in which the rents and profits thereof were disposed of upon or after the execution of said deed?

243 Answer to Int. 45. None whatsoever that I know of during the lifetime of Henry W. Kingsbury until after August, 1861.

Int. 46. What part, if any, had the said Henry W. Kingsbury ever taken in the management of the said property to your knowledge prior to the 25th of March, 1862?

Answer to Int. 46. None that I know of further than this: It was my custom, from regard and deference to him, to report in my occasional interviews with him every thing relating to our common interests and to undertake no important matter in relation thereto without his willing assent.

Int. 47. In what manner had the income derived therefrom subsequent to the death of said Julius J. B. Kingsbury and before March 25, 1862, been disposed of?

Answer to Int. 47. In the payment of taxes, assessments, legal expenses, attorneys' fees, agents, for improvements on the property, and in defraying expenses of Mrs. Jane C. Kingsbury, Henry W. Kingsbury, and my wife, and for other general purposes connected with the management of an estate.

Int. 48. Where and in what manner was the life of said Henry W. Kingsbury passed?

Answer to Int. 48. From 1855 to the spring of 1861 either at school or as a cadet of the United States Military Academy.

244 He remained at the Military Academy until after the outbreak of the war with the Southern States, when he was promoted into the army as a lieutenant. He was subsequently promoted to higher grades, and remained in the army until his death, which I learned was in September, 1862.

Int. 49. Give the full name of Mrs. Buckner before her marriage.

Ans. to Int. 49. Her name was Mary Jane Kingsbury. After marriage it was her custom to drop her middle name and to call herself Mary Kingsbury Buckner.

Int. 50. When, from whom, and under what circumstances did you first learn that said Henry W. Kingsbury left any will or writing purporting to be his last will and testament?

Answer to Int. 50. I first learned the fact late in the year 1866 or in January, 1867, under the following circumstances: During the summer and autumn of 1866 my wife was on a visit to her mother in Connecticut. While on that visit she learned from her mother of the probable existence of a will, and was informed by her that some time after the death of her son, Henry W. Kingsbury, she had written to Mr. Latrobe, of Baltimore, who she understood was the counsel of Mrs. Eva Kingsbury, to know what steps were being taken in regard to the estate in Chicago, and in reply to this inquiry Mr. Latrobe had sent her a copy of what purported to be the will of Henry W. Kingsbury. My wife received from her

245 mother a copy of that paper and brought it with her to New

Orleans, where we then resided. She reached New Orleans, I think, about the last day of December, 1866, and a few days or a very short time after her arrival she showed me a copy of the paper which her mother had received from Mr. Latrobe. I have since seen the original paper purporting to be the will of Henry W. Kingsbury, all of which was in the handwriting and signed by him, for I knew his handwriting well. The paper received by my wife was an accurate and exact copy of the original will.

Int. 51. State, if you know, to what congressional district the said Henry W. Kingsbury was credited upon his appointment as a cadet at West Point.

Answer to Int. 51. To a congressional district in the State of New York of which the city of Brooklyn, or a part of the city of Brooklyn, formed a portion.

Int. 52. If you know anything further which would be of advantage to the complainants in the cross-bill and the defendants to the original bill of complaint in this cause, state the same fully.

Answer to Int. 52. Without refreshing my memory I cannot now recall any other facts which are material to the issues involved in this controversy.

Int. 53. State whether there was any child or children, issues of your marriage with Mrs. Buckner; and, if yea, state when the
246 same was or were born, and state whether the same is or are now living.

Answer to Int. 53. There were two children, the issues of our marriage; the first a daughter, "Lilly Buckner," born March 7th, 1858, and now living; the second, a son, Henry Kingsbury Buckner, born February 9th, 1862.

Counsel for Mrs. Eva Lawrence, one of the defendants to the original bill and to the cross-bill in this cause, object to the direct interrogatories numbered 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, and 48, propounded to Simon B. Buckner, and to each of them severally, as immaterial and incompetent, and propose the following cross-interrogatories to be answered by said witness:

Cross-int. 1. Were you or not, at the time of the execution of the deed referred to in direct interrogatory 19, a citizen of the State of Kentucky? If yea, how long had you then been a citizen of that State?

Answer to cross-int. 1. Yes; I was a citizen of Kentucky at that time. I am a native of the State, and, with the exception of a temporary residence in Illinois, had always regarded myself as a citizen of Kentucky. My citizenship was last resumed in the State in October, 1857, at which time I located in Jefferson county, Kentucky. Since that date I have always claimed to be a citizen, though
247 much of the time residing elsewhere.

Cross-int. 2. Did you at the time referred to in the preceding cross-interrogatory hold any official position in the State of Kentucky; if yea, what position? And, if you held more than one office,

state what offices you held and for how long a time you had then held any such office or offices.

Answer to cross-int. 2. Yes; I held the office of inspector general of Kentucky. That was the only office I held. I had held that office nearly a year.

Cross-int. 3. Had you been at any time previous to the year 1861 connected with the United States military establishment? If yea, state when, where, and how that connection first commenced, how long it continued, what positions you held during that time in the Army of the United States, and when you retired from the army.

Ans. to cross-int. 3. Yes; my connection first commenced as a cadet in the year 1840. I was transferred, on graduating, at the Military Academy, in 1844, as brevet 2d lieutenant, to the 2d regiment of infantry. I was subsequently promoted 2d lieutenant in the 6th infantry, and served through the Mexican war in that capacity. For services in that war I was promoted as brevet 1st lieutenant and brevet captain. In 1851 I was promoted as 1st lieutenant in the line. In 1852 I was appointed by selection a captain in the general staff. I held both my line and staff commissions
248 until about the last of March, 1855, when I resigned them.

Cross-int. 4. If you shall state in answer to cross-interrogatory 2 that you were the adjutant general of the State of Kentucky in May, 1861, state where you were appointed or elected to said office, by whom you were appointed or elected, and for how long a term you were chosen.

Answer to cross-int. 4. This question seems to have been asked under a misapprehension. I was not adjutant general, but inspector general, as I have previously stated the first-named office was held by another gentleman. On the passage of the militia law, in the spring of 1860, the office was tendered to me by the Governor of Kentucky, and was declined by me; but when he renewed the tender, accompanied by a special request that I should aid him in the organization of the militia of the State, I accepted the appointment from the Governor of Kentucky, in whom was vested by law the power of appointment. The law did not limit the duration of the appointment.

Cross-int. 5. Did you continue to hold and exercise said office of adjutant general until the expiration of the time for which you were chosen, or how otherwise? If not, when did you cease to officiate as such officer and what — the cause or inducement which led to your withdrawal from that service?

Answer to cross-int. 5. As previously stated, the law did
249 not fix the term of the office which I held; but early in 1861 an amendment was passed to the law requiring the confirmation of the senate of all the appointments of general officers of the militia. On the passage of this act I resigned the office of inspector general, but very soon thereafter was renominated for the office by the Governor and confirmed by a unanimous vote of the senate of Kentucky. It was my purpose then to retire from the position, but at the solicitation of gentlemen of all parties in this State I continued to hold the office. The cause which ultimately led to my

resigning the office was the adoption of subsequent legislation which, in my opinion, so divided the duties which had previously belonged to the inspector general among different offices that I considered my holding the position any longer could result in no public benefit. I think this legislation took place in June, 1861. As I did not see any obligation resting upon me to hold the office any longer, I then announced my purpose to resign it, but at the instance of the Governor of the State, and at the request of the Hon. John J. Crittenden, I consented to hold the office for a short time, until I could accomplish a duty which both of the gentlemen expressly desired me to perform. This duty was to confer with the President of the United States on the then existing state of public affairs in Kentucky. I was accredited to the President by an official letter
250 from the Governor of Kentucky, stating the objects for which I had been ordered to Washington. I went to Washington city under the orders of the Governor and in the company of Hon. J. J. Crittenden, who had seen my instructions and knew fully of the objects of the visit and fully approved of its purposes. I had two interviews with the President, of a pleasant and satisfactory character, and at both of which Mr. Crittenden was present. The first interview was on the 5th or 6th of July, 1861; the second was, by appointment of the President, two days subsequently. Shortly after these interviews I returned to Kentucky, made my report to the Governor of the State, and in pursuance of the resolutions previously formed and announced, both to the Governor and the President, resigned the office of inspector general. It was on or about the 18th of July, 1861, that I resigned the office.

Cross-int. 6. Were you or not connected with the Confederate military service during the late civil war? If yea, when did you first enter that service? What positions did you occupy during the war, and how, and by whom, and by what authority were you appointed to those positions?

Answer to cross-int. 6. I was. I entered that service on the 16th of September, 1861, in Nashville, Tennessee. I remained in that service until the close of the war, in May, 1865. I held, successively, the position of brigadier general, major general, and lieutenant general, under commissions issued under authority of the
251 president of the Confederate States.

Cross-int. 7. Did you or not in the spring or summer of 1861 visit the city of Washington? If yea, when did you arrive there, how long did you remain there or in that vicinity, and when did you return to the State of Kentucky?

Answer to cross-int. 7. I did, as previously stated in my response to cross-interrogatory No. 5, which I make part of this answer. I reached here on the 4th of July, 1861. I remained until the 8th or 9th of the same month, being all the time within the city limits of Washington city. I left Washington city by the Baltimore train on the 8th or 9th of July, 1861, and arrived in New York city the following day. After transacting some business there and paying a brief visit to my wife's mother in Connecticut I returned to my home in Louisville, Ky., about the 15th or 16th of July, 1861.

Cross-int. 8. How long did you remain at your home in Louisville and how long within the "Union lines," so called, after your return from Washington in the summer of 1861, and where did you go afterwards? Did you abandon your residence at Louisville? If yea, did your family or any and what portion of it accompany or follow you?

Answer to cross-int. 8. I remained at my home in Louisville, Ky., until the latter part of August, 1861, with the exception of
252 two visits paid my mother, who resided on my farm in Hart county, Kentucky, about 70 miles south of Louisville. Late in August, the exact date not remembered, I went South, intending to return in a week or two. I did not abandon my residence at Louisville, but I left my family in it, intending to return in a week or two, and on my return to lease my residence in Louisville and to remove either to Elizabethtown, Kentucky, where my mother owned a residence, or to my farm, which she then occupied. With this expectation I stopped on my way South to see my mother on the subject. After the 12th of September, 1861, I sent word to my wife to join me at Nashville. I met her at the Kentucky and Tennessee boundary line on the evening of the 16th of September, 1861.

Cross-int. 9. Did you ever inform the late Henry W. Kingsbury of the purpose or object you had in view in the execution of the deed referred to in direct interrogatory 19; if so, when and where?

Answer to cross-int. 9. I had but one conversation with Henry W. Kingsbury on the subject, which is fully related, so far as I recollect it, in my reply to direct interrogatory No. 32, and in that answer, which I make part of this, I have stated all that was said by either of us on the subject, so far as I recollect.

Cross-int. 10. When and where did you last see the said Henry W. Kingsbury?

253 Answer to cross-int. 10. About the 8th of July, 1861, in Washington city.

Cross-int. 11. To whom did you ever communicate the intention you sought to carry out by the execution of the deed above referred to at any time prior to the date of said deed? When and where was it that such intention was expressed? Did any one know that you entertained such an intention, so far as you are aware, before the deed was executed; if so, who and how and when were they apprised, of it?

Answer to cross-int. 11. The general objects I had in view were made known to my atttorney and confidential friend, William F. Barrett, of Louisville, Kentucky. He knew my intentions from conversations held with me prior to the execution of the deed; the exact time of those conversations I do not now remember, but there were several of them during the spring of 1861, *and* in Louisville, Kentucky, and I held frequent conversations on the subject with my wife, as I have previously stated in my answer to the 32d direct interrogatory, which I make part of this answer. Some of my conversations with him in regard to it were a year or two before the execution of the deed.

Cross-int. 12. Did or not Mrs. Lawrence, or some one in her be-

half, or otherwise, after the late Henry W. Kingsbury's death, send you information in relation to the writing executed by him
254 at Fortress Monroe, purporting to be of the nature of a last will and testament; if so, when and where did you receive that information?

Answer to cross-int. 12. I did not receive from Mrs. Lawrence or any one in her behalf, as far as I recollect, any information in relation to the writing referred to after the death of Henry W. Kingsbury. The manner in which I first received that information has been stated in a previous reply, viz., from my wife, about the last of December, 1866, or early in January, 1867, in New Orleans, my wife having received the information from her mother, and her mother having received it in reply to an inquiry made by her from Mr. Latrobe, of Baltimore. This is the first time, so far as I can remember, that I received any information in regard to the will.

Cross-int. 13. Where were you and your family at the time of the said Henry W. Kingsbury's death? Were there at that time any regular postal communications between the place of Mrs. Lawrence's residence and the section of country where you then were?

Answer to cross-int. 13. At the time alluded to I was with the Confederate army, in Kentucky, in the vicinity of Green River; my family were in Marietta, Georgia. About a month elapsed before the postal communication on the part of the United States could be re-established with the locality where I then temporarily was, and several years before they were re-established with the place
255 where my family then were. I can state, though the question is not distinctly asked, that we were only temporarily in these localities, and that during the subsequent continuance of the war we were in other localities to which the postal arrangements of the United States did not extend, though the postal arrangements of the Confederate Government were nearly all the time in operation.

Cross-int. 14. How long were such postal communications interrupted, and when for the first time after the said Henry W. Kingsbury's death were you in a position to receive and send freely communications by post from and to Mrs. Lawrence?

Answer to cross-int. 14. The United States postal communications with the localities where we were were suspended until May or June, 1865, when for the first time after the death of Henry W. Kingsbury I was in position to receive communications from Mrs. Lawrence or send communications to her through the United States Post Office Department.

Cross-int. 15. When and from whom did you first receive a copy of the writing referred to in cross-interrogatory 12, and where and by whom were you first informed of the contents of the said writing or its substance and purport? Where were you residing at that time, and have you or not since then continued to reside uninterruptedly in the United States?

256 Answer to cross-int. 15. I have stated in my reply to direct interrogatory No. 50 my answer to this question. I refer to

that for my answer. I was then residing in New Orleans, and have since continued to reside in the United States.

Cross-int. 16. Where have you resided since the close of the late civil war?

Answer to cross-int. 16. Under the terms of the military convention by which the forces I commanded were surrendered, I could not return to Kentucky, which I still regard as my home. I therefore resided in New Orleans until after these restrictions of the convention were removed, soon after which I returned to Kentucky, and I have been residing in that State since about June 1st, 1868. The first time I returned to Ky. after the war was in February or March, 1868, at which time I engaged the services of counsel in behalf of my wife in this suit now pending.

Cross-int. 17. Please state specifically what portions, if any, of the real estate of the said Julius J. B. Kingsbury left by him at his decease were sold or disposed of by his legal representatives after his decease and prior to the death of his son, the late Henry W. Kingsbury. Please give the dates and particulars of all such alienations, including the names of the purchasers, the prices received, and a general description of the property sold in each instance.

257 & 258 Answer to cross-int. 17. I remember the sale of two pieces of his property, a body of farming land known as the "Caldwell reservation," six or eight miles from Chicago, and a strip from the northern portion of the "Kingsbury tract," in Chicago. The first was sold to John Rogers, the second to S. L. Baker. I have no memoranda now in my possession to enable me to give exact dates of the transaction. In reference to the sale to John Rogers, I remember these facts: In 1855 Rogers held a lease for a term of years of the whole of the "Kingsbury tract," for which he paid what was considered then a nominal rent.

In 1854 a person named Cook rented from Rogers a small part of this tract, for which he stipulated a payment much larger than Rogers paid for the entire tract. Major Kingsbury had advanced money to Cook for the purpose of putting up an extensive manufacturing establishment on the grounds which Cook had rented from Rogers. Cook failed in business and Major Kingsbury was compelled to take possession of the property, and then he became a tenant of his own tenant, and was placed under obligations to pay his tenant a much larger sum for a small part of the premises than he himself received from that tenant for the whole tract. It was to make an arrangement with reference to these leases and at the same time to place substantial improvements on the "Kingsbury tract" that the sale was made to Rogers. I think the property was sold to him for about seven thousand dollars,

259 but I do not remember the exact amount. The property was paid for by some arrangement with reference to this lease by the erection by Rogers of a brick building for the estate on the corner of Kingsbury and Kinzie streets, and, I think, by work done—either in deepening the channel front of the wharves or in building new wharves, I am not certain which. With reference to the sale to Baker, the estate was already much indebted to him under

an arrangement made by Major Kingsbury, whereby Baker had from time to time advanced to counsel and for other purposes of the estate, both before and after the death of Major Kingsbury, a good many thousands of dollars. I think the amount of this sale was $25,000 or $30,000. No money was received by me for this property except as specified above, and a considerable portion of it remained unpaid at the time I went South.

Cross-int. 18. Please state whether you or your wife have received any portions of the proceeds of the sales inquired of in the preceding cross-interrogatory. If yea, what sums have been so received by you or her and when were they so received?

Answer to cross-int. 18. We have not, unless the sums which from time to time we drew from the estate for current expenses could be considered as part of what had been paid on this property, and, on this subject, I will state that there was no time during my administration of the affairs of the estate when the estate was not
260 indebted to me, either for compensation due me under the arrangement with Major Kingsbury or for money advanced by me to the estate at different times.

Cross-interrogatories upon the part of the complainants in the said cross-bill and the defendants (except Eva Lawrence and Albert G. Lawrence) to the original bill to the new matter enquired about in the cross-interrogatories on the part of Eva Lawrence.

Interrogatory 1. State the reason why you retired from the United States Army prior to the year 1861.

Answer to Int. 1. It was to take charge of the property of Major Kingsbury in Chicago, Illinois, at his repeated solicitations and under a specific arrangement made with him with that view.

Int. 2. For how long a time before you entered the Confederate military — did you have any purpose or intention of so doing?

Answer to Int. 2. For about four or five days. My purpose was formed on the 11th or 12th of September, 1861, while in Tennessee. A position in the Confederate army had previously been tendered me about the last of August or first of September of the same year, but I then promptly declined. I was in Nashville, Tennessee, returning to Louisville, Kentucky, when I formed my resolution for the first time, on the 11th or 12th of September, 1861, and I
261 immediately tendered my services by telegraph to the Confederate government, as before stated. I received information of the acceptance of my services about the 16th of the same month. I should add that on the previous day, but subsequent to the tender of my services, General Albert Sydney Johnson appointed me to a command, subject to the approval of the Confederate government.

Int. 3. Had you any such intention at or before the time of the execution of the deed of May 15, 1861, to Henry W. Kingsbury?

Answer to Int. 3. I had not.

Int. 4. State whether or not the condition of the country had any influence in the making of said deed of May 15, 1861. And, if so, what?

Answer to Int. 4. As far as the disposition of my own property was concerned, whether derived from inheritance or obtained by purchase, it exercised no influence on my action; but, as I have already fully stated, the disturbed condition of the country was the occasion, but not the cause, of my making that deed.

Int. 5. State whether or not said deed was made with any view of your entering the Confederate military service.

Answer to Int. 5. It was not. On the contrary, it was my purpose to avoid all participation in the war, and it was my expectation then and for a long time afterwards—in fact, until about the 12th of September, 1861—not to take part in it.

Int. 6. If your visit to Washington in the summer of 1861
262 had any reference to matters in controversy in this suit you may state fully the facts in regard to the same.

Answer to Int. 6. It had none whatever. The sole object of my visit, as previously stated, was in obedience to the orders of the Governor of Kentucky to represent to the President of the United States the condition of affairs in Kentucky, and to obtain his views on the same; but for these orders I would not then have gone there. But, being in Washington, I once or twice visited the camp of General Burnside, then in the limits of Washington city, not far from the Soldiers' Home, to see him in reference to some business of the estate. A note on which I had raised money for the estate of Major Kingsbury, and which General Burnside was to have protected under the arrangement made with him, had gone to protest, and I had recently paid it from my own means. It was on this subject that I went to see him. Some other business of the estate, I do not distinctly remember what, induced me to return home by way of New York city; but attention to this business was only an incident of the journey and had no part in causing it.

Int. 7. How does the account between yourself, or yourself and your wife, or your wife and the estate of the late Henry W. Kingsbury, stand, taking into consideration the proceeds of sales enquired about in cross-interrogatories on the part of the defendant, Eva Lawrence, and the rents and profits received from the property of the late Julius J. B. Kingsbury and the payments made by you or your wife or both?

263 Answer to Int. 7. The compensation I was to receive from Major Kingsbury was $3,500 per year. It was the proposition of Henry W. Kingsbury, subsequent to his father's death, to fix it at $4,000 per year, but I declined it. I advanced at one time to the estate upwards of $9,000, lent me by my mother, and at another time about $6,000, obtained from the same source. Since my mother's death I have paid to my sister her half of the above sums. At other times I advanced to the estate about $10,000 of money raised on my endorsement in Louisville, Kentucky. Money was drawn by me from the estate to meet part of these payments, but an equitable adjustment of my accounts with the estate would leave a balance in my favor of not less than $10,000 or perhaps $15,000. My wife drew no money from the estate except through me, and I have considered

in my estimate all that was drawn from the estate, both for her and for me.

Int. 8. If you know of any other matter of advantage to the complainants in said cross-bill in this suit state the same fully.

Answer to Int. 8. I do not remember any other facts material to the issues involved.

S. B. BUCKNER.

264 I, George M. Davie, of the county of Jefferson and State of Kentucky, a commissioner duly appointed to take the deposition of the said Simon B. Buckner, a witness whose name is subscribed to the foregoing deposition, do hereby certify that previous to the commencement of the examination of the said Simon B. Buckner as a witness in the suit between the said Henry W. Kingsbury, complainant in the original bill, and Ambrose E. Burnside, Jane C. Kingsbury, Mary J. Buckner, Simon B. Buckner, John J. D. Kingsbury, Eva Lawrence, and Albert G. Lawrence, defendants hereto, and Mary K. Buckner and Simon B. Buckner, complainants in the cross-bill, and Henry W. Kingsbury, Eva Lawrence, Albert G. Lawrence, and Jane C. Kingsbury, defendants thereto, he was duly sworn by me as such commissioner to testify the truth in relation to the matter in controversy between the said Henry W. Kingsbury, complainant in the original bill, and Ambrose E. Burnside, Jane C. Kingsbury, Mary J. Buckner, Simon B. Buckner, John J. D. Kingsbury, Eva Lawrence, and Albert G. Lawrence, defendants, and Mary K. Buckner, and Simon B. Buckner, complainants, in the cross-bill, and Henry W. Kingsbury, Eva Lawrence, Albert G. Lawrence, and Jane C. Kingsbury, defendants, so far as he should be interrogated concerning the same, and that the said deposition was taken at my office, at the city of Louisville, in the county of Jefferson and State of Kentucky, on the fifteenth day of December, A. D. 1870, and that after said deposition was taken by me the interrogatories and answers thereto as written down were read over to
265 the said witness, and that thereupon the same was signed and sworn to by the said deponent, Simon B. Buckner, before me, the oath being administered by me as such commissioner at the place and on the day and year last aforesaid.

I further certify that all the interlineations and erasures in the foregoing deposition were made by me at the instance and request of the said Simon B. Buckner before his signing of the same.

GEO. M. DAVIE,
Commissioner.

The following deposition of Wm. F. Barrett, to wit:

STATE OF ILLINOIS, } ss:
Cook County, }

In the Circuit Court of Cook County.

HENRY W. KINGSBURY, by His Next Friend, CORYDON BECKWITH,
vs.
AMBROSE E. BURNSIDE, JANE C. KINGSBURY, Mary J. Buckner, Simon B. Buckner, John J. D. Kingsbury, Eva Lawrence, and Albert G. Lawrence. } Bill of Complaint. In Chancery.

MARY K. BUCKNER and SIMON B. BUCKNER
vs.
266 HENRY W. KINGSBURY, EVA LAWRENCE, Albert G. Lawrence, and Jane C. Kingsbury. } Cross-Bill. In Chancery.

To the complainant in said original bill of complaint and the defendants in said cross-bill and their solicitors:

Take notice that on the fourteenth day of December, A. D. 1870, at ten o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, the undersigned will sue out of the office of the clerk of the circuit court of the county of Cook aforesaid a *dedimus protestatum* or commission under the seal of said court and directed to George M. Davie, Esq., of the city of Louisville, in the county of Jefferson and State of Kentucky, or to any judge or justice of the peace of the county and State last above mentioned, to take the deposition of Wm. F. Barrett upon the interrogatories hereto attached, to be read in evidence on the part of the complainants in said cross-bill and defendants to said original bill on the hearing of the above-entitled cause, now pending in the said circuit court on the chancery side thereof, when and where you can appear and file cross-interrogatories and join in said commission if you so wish.

Dated this fifth day of December, A. D. 1870.

GOUDY & CHANDLER,
Solicitors for said Complainants in said Cross-Bill, etc.

267 We hereby acknowledge service of the foregoing notice and attached interrogatories by a copy thereof this fifth day of December, A. D. 1870, and consent that the commission may issue at the time named above, longer notice being hereby waived.

B. F. AYER,
Solicitor for Eva Lawrence and Albert G. Lawrence.
C. BECKWITH,
Guardian ad Litem for Henry W. Kingsbury.
JAMES E. MONROE,
Of Counsel for Jane C. Kingsbury.

Interrogatories referred to in the foregoing notice and to be answered by William F. Barrett, a witness to be produced, sworn, and examined under and by virtue of the annexed commission, before George M. Davie, Esq., or any judge or justice of the peace of the county or State last mentioned in the within notice, in the cause therein mentioned and referred to and now pending in the circuit court of Cook county, Illinois, in chancery, wherein Henry W. Kingsbury is complainant in the original bill of complaint and Ambrose E. Burnside, Jane C. Kingsbury, Mary J. Buckner, Simon B. Buckner, John J. D. Kingsbury, Eva Lawrence, and Albert G. Lawrence are defendants thereto, and wherein Mary K. Buckner and Simon B. Buckner are complainants in the cross-bill and Henry W. Kingsbury, Eva Lawrence, Albert G. Lawrence, and Jane C.
268 Kingsbury are defendants thereto, on the part and behalf of said complainants in said cross-bill and the defendants, Ambrose E. Burnside, Jane C. Kingsbury, Mary J. Buckner, Simon B. Buckner, and John J. D. Kingsbury, to said original bill, as follows, to wit:

1. What is your name, age, residence, and occupation?

2. Are you acquainted with Mrs. Mary K. Buckner and Simon B. Buckner, parties in this suit; and, if yea, how long have you known them?

3. State, if you can, who prepared a deed, dated May 15, 1861, executed by said Mary K. Buckner and Simon B. Buckner to Henry W. Kingsbury, purporting to convey lots 5 and 6, block 35, original town of Chicago, Illinois, and a tract of land in the city of Chicago known as the "Kingsbury tract," formerly owned by the father of Mrs. Buckner.

4. Was you present when it was signed by the parties, respectively? And, if yea, state all the persons present.

5. Was you present when said deed was acknowledged? And, if yea, state all the persons present. Was the husband of Mrs. Buckner present when it was acknowledged by her? Was she examined separate and apart from her husband? Did the officer who took the acknowledgement explain to Mrs. Buckner the contents and meaning of the deed?

6. Where was Henry W. Kingsbury, mentioned as the
269 grantee, when said deed was signed and acknowledged?

7. Who requested or directed you to prepare the deed?

8. Did you have any conversation with Mrs. Buckner before the deed was prepared or signed by her husband?

9. Where was her husband when you first had an interview with her? Did she sign the deed at that time? Did you advise her to sign it or not to sign it at that time? By whom was the presence of her husband procured when the deed was signed by Mrs. Buckner?

10. What, if anything, was the consideration for said deed?

11. Why was said deed made? And give the source of your information as to the truth of the statements you make.

12. Where was Simon B. Buckner on the 20th, 21st, and 22d days of July, 1861? State your means of knowledge.

13. Was said deed mentioned in the third interrogatory executed to enable General Buckner to go into the Confederate army? Was there any purpose or intention by General Buckner, on or before May 15, 1861, to enter the rebel army? And, if you answer no, state your means of knowledge.

14. State any other facts material in this suit of benefit to the complainants in the cross-bill and within your knowledge.

GOUDY & CHANDLER,
Solicitors for said Complainants in said Cross-Bill, etc., etc.

270 Council [counsel] for Mrs. Eva Lawrence, one of the defendants, object to direct interrogatories numbered 5, 8, 9, 10, 11, 12, and 13, propounded to William F. Barrett, and to each of said interrogatories, as immaterial and inconsistent [incompetent], and propose the following cross-interrogatories to be answered by said witness:

Cross-interrogatory 1. When and before whom was the said deed referred to in the third direct interrogatory acknowledged by Mrs. Buckner?

Cross-int. 2. Where was the said deed acknowledged, and if you were present why did you attend the parties on that occasion?

Cross-int. 3. What was done with the said deed after it was executed and acknowledged?

Cross-int. 4. Was or not General Buckner an avowed opponent of the coercive policy which had been adopted by the national administration towards the States in insurrection on the 15th day of May, 1861?

Cross-int. 5. Was or not Gen. Buckner, on the 15th day of May, 1861, openly opposed to aid being rendered by the State of Kentucky to the national administration in its efforts to suppress the rebellion by force of arms?

Cross-int. 6. Was or not Gen. Buckner, on the 15th day of May, 1861, opposed in sentiment to any effort being made to suppress the rebellion by military force?

Cross-int. 7. To what political party in the State of Kentucky did Gen. Buckner belong on the 15th day of May, 1861?

271 Cross-int. 8. Can you state on your own knowledge that Gen. Buckner did not, on the 15th day of May, 1861, have some idea that he might engage in the service of the Confederate government?

Cross-int. 9. Did Gen. Buckner take an active part in the public affairs in the State of Kentucky after the inauguration of President Lincoln on the 4th of March, 1861, down to the time he joined the Confederate army?

Cross-int. 10. Was his conduct and course of action as a public man of a uniform and consistent tenor between March 4, 1861, and the time he left Louisville to join the Southern Confederacy? If he changed his opinions or his position in regard to public questions during that interval, when did that change occur?

B. F. AYER,
Of Counsel for Eva Lawrence.

The deposition of William F. Barrett, of the county of Jefferson, State of Kentucky, a witness of lawful age produced, sworn, and examined upon his corporal oath, on the sixteenth day of December, in the year of our Lord eighteen hundred and seventy, at the office of George M. Davie, in the city of Louisville, in the county aforesaid, by me, the said George M. Davie, a commissioner duly appointed by a *dedimus potestatum* or commission, issued out of the clerk's office of the circuit court of Cook county, in the State of Illinois, bearing teste in the name of Norman T. Gassette, clerk of said circuit court,
272 with the seal of said court affixed thereto, and to me directed as such commissioner, for the examination of the said William F. Barrett, a witness in a certain suit and matter in controversy now pending and undetermined in the said circuit court, wherein Henry W. Kingsbury, by his next friend, Corydon Beckwith, is plaintiff and Ambrose E. Burnside, Mary J. Buckner, Simon B. Buckner, Jane C. Kingsbury, John J. D. Kingsbury, Eva Lawrence, and Albert G. Lawrence and [are] defendants, in behalf of the said Mary J. Buckner and Simon B. Buckner, as well as upon the cross-interrogatories of Eva Lawrence as on the interrogatories of the said Mary K. Buckner and S. B. Buckner, and upon the cross-bill of the said Mary J. Buckner and Simon B. Buckner in said suit, complainants, against Henry W. Kingsbury, Eva Lawrence, Albert G. Lawrence, and Jane C. Kingsbury, defendants, to said cross-bill, in behalf of said complainants in said cross-bill, which were attached to and inclosed with the said commission, and upon none others.

The said WILLIAM F. BARRETT, being first duly sworn by me as a witness in the said cause previous to the commencement of his examination to testify the truth, as well on behalf of the plaintiffs in the original bill as the defendants thereto, and as well on behalf of the defendants to the cross-bill as of the plaintiffs to the same, in relation to the matters in controversy between the said plaintiffs and defendants, so far as he should be interrogated, testified and deposed as follows, to wit:

273 Int. 1. What is your name, age, residence, and occupation?

Answer to Int. 1. My name is William F. Barrett; I am fifty years old; I reside in Louisville, Kentucky; I am a lawyer.

Int. 2. Are you acquainted with Mrs. Mary K. Buckner and Simon B. Buckner, parties to this suit; and, if yea, how long have you known them?

Answer to Int. 2. I am acquainted with Mrs. Mary K. Buckner and her husband, Simon B. Buckner. I have known the former some 12 or 15 years and I have known General Buckner for 35 years.

Int. 3. State, if you can, who prepared a deed, dated May 15th, 1861, executed by said Mary K. Buckner and Simon B. Buckner to Henry W. Kingsbury, purporting to convey lots 5 and 6, block 35, original town of Chicago, Illinois, and a tract of land in the city of Chicago known as the "Kingsbury tract," formerly owned by the father of Mrs. Buckner.

Answer to Int. 3. I prepared the deed, dated May 15th, 1861, executed by S. B. Buckner and Mary K. Buckner to Henry W. Kingsbury, purporting to convey lots 5 and 6, block 35, original town of Chicago, Illinois, and a tract of land in the city of Chicago known as the "Kingsbury tract," formerly owned by the father of Mrs. Buckner.

Int. 4. Was you present when it was signed by the parties, respectively? And, if yea, state all the persons present.

274 Answer to Int. 4. I was present when the deed was signed by the parties, respectively, they and the notary who took the acknowledgment and myself being the only persons present.

Int. 5. Was you present when said deed was acknowledged? And, if yea, state all the persons present? Was the husband of Mrs. Buckner present when it was acknowledged by her? Was she examined separate and apart from her husband? Did the officer who took the acknowledgment explain to Mrs. Buckner the contents and meaning of the deed?

Answer to Int. 5. I was present when the deed was acknowledged. I have in my former answer stated all the persons who were present. S. B. Buckner was present when the deed was acknowledged by Mrs. Buckner. She was not examined separate and apart from her husband. Whether the officer explained the contents and meaning of the deed I have no recollection.

Int. 6. Where was Henry Kingsbury, mentioned as grantee, when said deed was signed and acknowledged?

Answer to Int. 6. Henry W. Kingsbury was not in Louisville at the time of making or executing the deed. He was, as I was informed, either at West Point or Washington city at the time.

Int. 7. Who requested or directed you to prepare the deed?

Answer to Int. 7. Gen. Buckner requested me to have the deed prepared.

275 Int. 8. Did you have any conversation with Mrs. Buckner before the deed was prepared or signed by her husband?

Answer to Int. 8. I suppose this question has reference to the object of my making the deed; if so, I answer yes.

Int. 9. Where was her husband when you first had an interveiw with her? Did she sign the deed at that time? Did you advise her to sign it or not to sign it at that time? By whom was the presence of her husband procured when the deed was signed by Mrs. Buckner?

Answer to Int. 9. I was intimate with Gen. Buckner and his wife, and I knew their wishes in relation to the wife's interest in the property inherited by her from her father. She desired him to have a greater interest than he was entitled to by virtue of the marriage. He desired that she should have the entire benefit of the same, and I had had conversation with her repeatedly on this point. Whether her husband was present at the first interview I cannot say. Buckner was absent from Louisville when his wife informed me that she was determined to execute the deed, and I, at her request, telegraphed him to return home, which he did. He was then in Frankfort, Ky. I advised her not to sign the deed at that time. She

insisted on doing so, and hence I telegraphed Buckner and thus procured his presence.

Int. 10. What, if anything, was the consideration for said deed?

276 Answer to Int. 10. There was no consideration whatever passed between the parties.

Int. 11. Why was said deed made? And give the sources of your information as to the truth of the statements you make.

Answer to Int. 11. I presume it was made for the purposes above stated, and I came to that conclusion from the repeated conversations had with Buckner and his wife especially.

Int. 12. Where was Simon B. Buckner on the 20th, 21st, and 22nd day of July, 1861? State your means of knowledge.

Answer to Int. 12. S. B. Buckner was in Kentucky on the 20th, 21st, and 22d of July, 1861. I went with my wife to visit her father, Judge W. C. Goodloe, and Buckner went with us on the train as far as Frankfort, Ky. This was on the evening of the 19th of July, 1861. My wife and I continued on our journey that evening to Lexington, Ky. I returned to Louisville on Tuesday evening following, when I again met Gen. Buckner. From these facts I am certain that he was in Kentucky on the days mentioned.

Int. 13. Was said deed mentioned in third interrogatory executed to enable Gen. Buckner to go into the Confederate army? Was there any purpose or intention by Gen. Buckner, on or before May 15th, 1861, to enter the rebel army? And, if you answer no, state your means of knowledge.

Answer to Int. 13. If the deed mentioned in the third interrogatory was made to enable Gen. Buckner to go with the Con-
277 federate army, I had no knowledge of the fact. If he had any idea at the time of entering the Confederate army I had no knowledge of it. I then believed he was an undoubted Union man. I judged so from his repeated conversations with me under all circumstances, and our relations were of the most intimate and confidential character. Iwas a Union man all the time, and I believed at that time his sentiments fully accorded with my own.

Int. 14. State any other fact material in this suit of benefit to the complainants in the cross-bill and within your knowledge.

Ans to Int. 14. I cannot now remember anything except that during the two or three months next after the deed of May, 1861, was executed I know that Gen. Buckner persuaded young men not to enter the Confederate service.

Counsel for Mrs. Eva Lawrence, one of the defendants, objected to direct interrogatories numbered 5, 8, 9, 10, 11, 12, and 13, propounded to William F. Barrett, and to each of said interrogatories, as immaterial and incompetent, and propose the following cross-interrogatories to be answered by the said witness.

Cross-int. 1. When and before whom was the said deed referred to in the third direct interrogatory acknowledged by Mrs. Buckner?

Answer to cross-int. 1. The deed was acknowledged on the day of

278 its date, the 15th of May, 1861, before Charles S. Thomasson, who was a notary public.

Cross-int. 2. Where was the said deed acknowledged; and, if you were present, why did you attend the parties on that occasion?

Answer to cross-int. 2. The deed was acknowledged at the office of the Hon. James Speed, who was afterwards the attorney general under Mr. Lincoln, and myself, we being partners in the practice of law, in the city of Louisville. I was present, and went and procured the notary, as I was acquainted with him and Buckner was not.

Cross-int. 3. What was done with the said deed after it was executed and acknowledged?

Answer to cross-int. 3. The deed after acknowledgment was by me or Mrs. Buckner given to a young man who was going to Chicago that evening, Buckner having left to return to Frankfort again before the notary had completed the certificate. This was done at Buckner's request.

Cross-int. 4. Was not General Buckner an avowed opponent of the coercive policy which had been adopted by the national administration towards the States in insurrection on the 15th of May, 1861?

Answer to cross-int. 4. I cannot say that he was, although he might have differed with the administration in its policy. I knew he greatly deplored the condition of the affairs of the country at the time, and seemed to have a greater horror of the effects of a civil war than any one I met, and often expressed a determination not to engage in it.

279 Cross-int. 5. Was or not General Buckner, on the 15th of May, 1861, openly opposed to any aid being rendered by the State of Kentucky to the national administration in its efforts to suppress the rebellion by force of arms?

Answer to cross-int. 5. I never heard him express an opinion in relation to that subject, that I now recollect, at that time.

Cross-int. 6. Was or not General Buckner, on the 15th of May, 1861, opposed in sentiment to any effort being made to suppress the rebellion by military force?

Answer to cross-int. 6. I cannot say whether he was or not; he never informed me of his views on that subject; I only know that he had a horror of seeing different sections of our country fighting against each other.

Cross-int. 7. To what political party in the State of Kentucky did Gen. Buckner belong on the 15th of May, 1861?

Answer to cross-int. 7. He never took any part in politics, but seemed to support Mr. John J. Crittenden's views.

Cross-int. 8. Can you state of your own knowledge that Gen. Buckner did not, on the 15th of May, 1861, have some idea that he might engage in the service of the Confederate government?

Answer to cross-int. 8. I cannot state of my own knowledge that Gen. Buckner did not, on the 15th of May, 1861, have some idea that he might engage in the service of the Confederate States; but I can and do say that if at any time Buckner had any such inten-

280 tion I did not know of it, nor do I now believe, from all that I have heard him say, that he had any such design at that time.

Cross-int. 9. Did Gen. Buckner take an active part in public affairs in the State of Kentucky after the inauguration of President Lincoln on the 4th of March, 1861, down to the time he joined the Confederate army?

Answer to cross-int. 9. So far as I know, he did not. I never knew of his attending a public meeting of a political character during the time. He attended only to the duties of the office of inspector general under the appointment of the Governor of the State, so far as I know.

Cross-int. 10. Were his conduct and cause of action as a public man of a uniform and consistent tenor between March 4, 1861, and the time he left Louisville to join the Southern Confederacy? If he changed his opinions on his position in regard to public questions during the interval, when did the change occur?

Answer to cross-int. 10. Ignoring the fact that he did go South, I saw nothing in his conduct or course of action as a public man which was not uniform and consistent between March 4th, 1861, and the time he left. I know nothing of any change of his opinions in regard to public questions during that interval, except from the fact of his then joining the Confederacy.

WM. F. BARRETT.

281 I, George M. Davie, of the county of Jefferson and State of Kentucky, a commissioner duly appointed to take the deposition of the said William F. Barrett, a witness whose name is subscribed to the foregoing deposition, do hereby certify that previous to the commencement of the examination of the said William F. Barrett as a witness in the said suit between the said Henry W. Kingsbury, complainant in the original bill, and Ambrose E. Burnside, Jane C. Kingsbury, Mary K. Buckner, Simon B. Buckner, John J. D. Kingsbury, Eva Lawrence, and Albert G. Lawrence, defendants thereto, and Mary K. Buckner and Simon B. Buckner, complainants in the cross-bill, and Henry W. Kingsbury, Eva Lawrence, Albert G. Lawrence, and Jane C. Kingsbury, defendants thereto, he was duly sworn by me as such witness to testify the truth in relation to the matter in controversy between the said Henry W. Kingsbury, complainant in the original bill, and Ambrose E. Burnside, Jane C. Kingsbury, Mary J. Buckner, Simon B. Buckner, John J. D. Kingsbury, Eva Lawrence, and Albert G. Lawrence, defendants, and Mary K. Buckner and Simon B. Buckner, complainants, in the cross-bill, and Henry W. Kingsbury, Eva Lawrence, Albert G. Lawrence, and Jane C. Kingsbury, defendants, so far as he should be interrogated concerning the same, and that the said deposition was taken at my office, in the city of Louisville, in the county of Jefferson, State of Kentucky, on the sixteenth day of December, A. D. 1870, and that after the said deposition was taken by me the interrogatories
282 and answers thereto, as written down, were read over to the said witness, and that thereupon the same was signed and sworn to by the said deponent, William F. Barrett, before me, the oath being administered by me as such commissioner at the place and on the day and year last aforesaid.

I further certify that all the interlineations and erasures in the foregoing deposition were made by me at the instance and request of the said William F. Barrett before his signing of the same.

GEO. M. DAVIE,
Commissioner.

The following deposition and exhibits of Mrs. Jane C. Kingsbury, to wit:

STATE OF ILLINOIS, } ss:
County of Cook, }

The People of the State of Illinois to James Griswold, Esq., of Old Lynn, in the county of New London, State of Connecticut, or to any judge or justice of the peace of said county of New London:

Whereas it has been represented to us that Mrs. Jane C. Kingsbury is a material witness in a certain cause now pending in our circuit court of Cook county in and for the county of Cook aforesaid, between Henry W. Kingsbury, complainant, and Ambrose E. Burnside and other defendants to the bill of complaint; and Mary K. Buckner and Simon B. Buckner, complainants, and Henry W. Kingsbury and other defendants to the cross-bills, and that
283 the said witness resides at Old Lynn aforesaid, without the said State of Illinois, and that her personal attendance cannot be procured at the trial of said cause:

Now know ye that we, in confidence of your prudence and fidelity, have appointed you commissioner to examine the said witness, and do therefore authorize and require you to cause the said witness to come before you, at such time and place as you may therefor designate and appoint, and diligently to examine the said witness on the oath or affirmation of the said witness, by you first duly in that behalf administered, and faithfully to take the deposition of the said witness upon all interrogatories inclosed with or attached to these presents, both on the part of the said plaintiffs and of the said defendants, and none others, and the same, when thus taken, together with this commission and the said interrogatories, to certify unto our said circuit court of Cook county with the least possible delay.

Witness Norman T. Gassette, clerk of our said court, and
[L. S.] seal thereof, at Chicago, in said county, this 6th day of December, A. D. 1870.

NORMAN T. GASSETTE, *Clerk.*

284 STATE OF ILLINOIS, } ss:
Cook County, }

In the Circuit Court of Cook County.

HENRY W. KINGSBURY, by His Next Friend, CORYDON BECKWITH,
vs.
AMBROSE E. BURNSIDE, JANE C. KINGSBURY, Mary J. Buckner, Simon B. Buckner, John J. D. Kingsbury, Eva Lawrence, and Albert G. Lawrence. } Bill of Complaint. In Chancery.

MARY K. BUCKNER and SIMON B. BUCKNER
vs.
HENRY W. KINGSBURY, EVA LAWRENCE, ALBERT G. LAWRENCE, and JANE C. KINGSBURY. } Cross-Bill.

To the complainant in said original bill of complaint and the defendants to said cross-bill and their solicitors:

Take notice that on the sixth (6th) day of December, A. D. 1870, at ten o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, the undersigned will sue out of the office of the clerk of the circuit court of the county of Cook aforesaid a *dedimus protestatum* or commission, under the seal of said court
285 and directed to James Griswold, Esq., of the — of Old Lynn, in the county of New London and State of Connecticut, or to any judge or justice of the peace of the county and State last above mentioned, to take the deposition of Mrs Jane C. Kingsbury upon the interrogatories hereto attached, to be read in evidence on the part of the complainants in said cross-bill and defendants to said original bill on the hearing of the above-entitled cause, now pending in the said circuit court on the chancery side thereof, when and where you can appear and file cross-interrogatories and join in said commission if you so wish.

Dated this twenty-fifth day of November, A. D. 1870.

GOUDY & CHANDLER,
Solicitors for said Complainants in said Cross-Bill, etc.

We hereby acknowledge service of the foregoing notice and attached interrogatories by a copy thereof this twenty-fifth day of November, A. D. 1870, and consent that the commission may issue at the time named above, longer notice being waived.

C. BECKWITH,
Guardian ad Litem and Next Friend of said Henry W. Kingsbury.
JAMES E. MUNROE,
Of Counsel for Jane C. Kingsbury.
BECKWITH, AYER, KALES,
Sol'rs for A. G. & Eva Lawrence.

286 Interrogatories referred to in the foregoing notice and to be answered by Mrs. Jane C. Kingsbury, a witness to be pro-

duced, sworn, and examined under and by virtue of the annexed commission, before James Griswold, Esq., or any judge or justice of the peace of the county and State last mentioned in the within notice, in the cause therein mentioned and referred to and now pending in the circuit court of Cook county, Illinois, in chancery, wherein Henry W. Kingsbury is complainant in the original bill of complaint and Ambrose E. Burnside, Jane C. Kingsbury, Mary J. Buckner, Simon B. Buckner, John J. D. Kingsbury, Eva Lawrence, and Albert C. Lawrence are defendants thereto, and wherein Mary K. Buckner and Simon B. Buckner are complainants in the cross-bill and Henry W. Kingsbury, Eva Lawrence, Albert G. Lawrence, and Jane C. Kingsbury are defendants thereto, on the part and behalf of said complainants in said cross-bill and the defendants, Ambrose E. Burnside, Jane C. Kingsbury, Mary J. Buckner, Simon B. Buckner, and John J. D. Kingsbury, to said original bill, as follows, to wit:

Interrogatories to be proposed to Mrs. Jane C. Kingsbury on the part of the defendants, except Albert G. Lawrence and Eva Lawrence, to the original bill and the complainants in the cross-bill.

1. What is your name, age, and residence?
2. Are you one of the defendants in this suit?
3. Are you the widow of Major Julius J. B. Kingsbury?

287 4. When did your late husband, Major Julius J. B. Kingsbury, die? Did he die testate or intestate?

5. Did he leave any children surviving him? And, if so, please give their names. Did he leave any descendants of deceased children?

6. Were these children also your own?

7. Was your daughter, Mary J., married; and, if so, when and to whom?

8. Was your son, Harry W., married; and, if so, when and to whom?

9. Is your son, Henry W., living or dead; and, if dead when and where did he die? Please state the cause of his death.

10. Did your son, Henry W., have any children born in lawful wedlock before or after his death? And, if so, please state when, and give the name of the child.

11. Was this his only child?

12. Has your son's widow married again; and, if so, when and to whom? Where does she now reside? Where does your grandson, Henry W., reside?

13. Did your son, Henry W., leave a will, or did he die intestate?

14. Where and from whom and under what circumstances did you learn he left a will? State fully.

15. Have you ever seen the original will?

16. Has a copy ever been furnished you; and, if so, when, and who furnished it? Did you request a copy or information before it was given?

288 17. Did you communicate the knowledge you obtained of the existence or contents of the will to your daughter, Mrs. Buckner, or her husband? And, if you did, please state when.

18. Did you give this information the first opportunity you had after acquiring it yourself?

19. Did your son, Henry W. Kingsbury, make any statement to you in regard to the share of real estate situated in Chicago, Illinois, descended to Mrs. Buckner (your daughter) from her father after the 15th day of May, 1861? And, if he did, please state what he said in regard to it.

20. If he made more than one statement or had more than one conversation in regard to Mrs. Buckner's share, please give them all as fully as possible.

21. What was said, if anything, as to a deed made by his sister, Mrs. Buckner, and her husband on or about May 15, 1861, to him conveying Mrs. Buckner's part of the property in Chicago which descended from her father?

22. Did your son, Henry W., ever write any letter to you in which he referred to such subject? And, if so, please attach any such letter or letters or copies thereof to this deposition.

23. If you cannot attach the same or copies because of loss, please give the contents, so far as relates to this subject.

24. Describe as nearly as you can all the property left by your husband.

25. Did your son, Henry W., ever acquire any real estate by purchase; and, if so, what, and where was it situated?

289 26. Did your son, Henry W., ever hold in his name any property in Chicago for the use and benefit of any person within your knowledge, except by deed of May 15, 1861, executed by Mrs. Buckner and her husband?

27. What was the pecuniary or property circumstances of your son in May, 1861? Was he worth any more than the value of the property inherited from his father?

28. Did your daughter have any property at that time other than the estate inherited from her father?

29. When and where was your son, Henry W., born?

30. Please state the places where he spent his life.

31. From what congressional district was he appointed a cadet at West Point?

32. Was he graduated at, before, or after the regular time? Was he immediately appointed a lieutenant in the regular army and did he enter active service?

33. Where was your late husband born? What was his profession or occupation?

34. When did he enter the army, how long continue in it, and was he a cadet also at West Point?

35. When did you marry him?

36. Did he have any fixed place of residence after the marriage?

37. Did your son, Henry W., have any fixed place of residence?

290 38. Please state any other matter or thing within your knowledge touching the matters in controversy in this case.

GOUDY & CHANDLER,
Solicitors for said Complainants in said Cross-Bill, &c.

Counsel for Mrs. Eva Lawrence, one of the defendants to the original bill and to the cross-bill in this cause, object to direct interrogatories numbered 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 36, and 37, propounded to Mrs. Jane C. Kingsbury, and to each of them severally, as immaterial and incompetent, and propose the following cross-interrogatories to be answered by the said witness:

Cross-interrogatory 1. Where did your late husband, Julius J. B. Kingsbury, die? Where did he and his family reside at that time, and how long had they resided there?

Cross-int. 2. Please state where the said Julius J. B. Kingsbury resided at the time of your marriage.

Cross-int. 3. Please state where he and his family resided afterwards, giving as nearly as you can the date of his removal to each place and the length of his and their residence at each place.

Cross-int. 4. When did your late husband retire from the army? Where did he reside at that time, and where did he and his family live afterwards, down to the time of his death?

291 Cross-int. 5. Did your said husband and his family reside at Detroit, in the State of Michigan, after he retired from the United States Army? If yea, how long did they reside there? Did they keep house there? Did he own the house in which he and they resided, or how otherwise?

Cross-int. 6. Where did you reside previous to your marriage, and how long had you resided there?

Cross-int. 7. Where have you resided since the death of your late husband, and for what length of time in each place?

Cross-int. 8. Where was your home at the time your son, the late Henry W. Kingsbury, was appointed a cadet at West Point? How long had you resided there at that time, and where have you since resided?

Cross-int. 9. Did your son, the late Henry W. Kingsbury, live with you at the time he entered the West Point Academy? Where was his home before that time, and how long had that been his home or usual place of residence?

Cross-int. 10. Was your son appointed after his graduation to the command of a regiment of volunteers in the service of the United States? If so, when and where did he receive his said appointment, and from whom? Did he accept said appointment and enter upon the discharge of its duties? If yea, how long did he serve in that capacity?

Cross-int. 11. Was your son at the time of his death acting as colonel of a regiment of Connecticut Volunteers in the United

292 States service? If yea, when did he first become connected with that regiment, and from whom did he receive that appointment?

Cross-int. 12. Have you ever resided in the State of Virginia; if yea, where and when and for what length of time?

Cross-int. 13. Did your late husband or yourself own any property in the State of Virginia at the time of his death; if so, what property and where was it situated?

Cross-int. 14. Have you purchased or acquired any property in the State of Virginia since the death of your late husband; if so, what property, and how and when did you acquire it?

Cross-int. 15. Have you resided or had a house or any usual place of residence in the State of Virginia since the death of your late husband; if so, at what place and for what length of time?

Cross-int. 16. Had your son, the late Henry W. Kingsbury, any property in the State of Virginia when he entered the army of the United States; if so, what property and where was it situated?

Cross-int. 17. Did you or not own a residence in the State of Connecticut at the time your son entered the army; if so, how and when did you acquire that property, where was it situated, and did you or not occupy it as your home; if yea, how long did you live there; from what time to what time?

293 Cross-int. 18. If you shall state in answer to any of the direct interrogatories that you had any conversation with your son, the late Henry W. Kingsbury, in relation to Mrs. Buckner's share of the property left by your late husband, please state the time and place of each conversation which you may testify to, and state who was present.

Cross-int. 19. If you shall state in answer to either of the direct interrogatories that your son, the late Henry W. Kingsbury, wrote you any letter or letters in which reference was made to Mrs. Buckner's share or interest in the property left by your late husband, you will please state when and where such letter or letters were written and when and where you received them.

Cross-int. 20. If you shall state that any letter or letters of the nature referred to in the last cross-interrogatory was or were received by you from your son, but that such letter or letters is or are lost, please state when you last saw such letter or letters and where. What did you do with the said letter or letters; did you ever exhibit them or either of them to any other person or persons; if so, when and to whom?

Cross-int. 21. If any such letter or letters were ever written and cannot now be produced by you, you will please state whether you have or not made a faithful and diligent search for and effort to secure them. Please state what steps you have taken to find or recover them.

294 Cross-int. 22. If you shall attempt to give the contents of any such letter or letters, you will please state whether or not you are now able to give the language used in said letters or the exact expressions of the writer, or how otherwise.

Cross-int. 23. Were such letters written in reply to any letters written to him by you on the same subject or how otherwise?

Cross-int. 24. When and to whom did you first communicate the fact that you had received any such letter or letters?

Cross-int. 25. When and to whom did you first communicate the contents of any such letter or letters?

B. F. AYER,
Of Counsel for Mrs. Eva Lawrence.

The deposition of Mrs. Jane C. Kingsbury, of the town of Old Lynn, in the county of New London and State of Connecticut, a witness named in the foregoing commission, and taken by virtue of and in pursuance of said commission hereto annexed.

The said JANE C. KINGSBURY, being first duly sworn by me, James Griswold, the said commissioner, as a witness in the cause named in said commission, previous to the commencement of her examination, to testify the truth, as well on the part of the complainants as the defendants, in relation to the matters in controversy between the said complainants and defendants so far as she should be interrogated, testified and deposed as follows:

Answer to Interrogatory 1. Jane C. Kingsbury; in my 61st
295 year; residence in Old Lynn, New London county and State of Connecticut.

Answer to Int. 2. I am.

Answer to Int. 3. I am.

Answer to Int. 4. On the 6th day of June, 1856, intestate.

Answer to Int. 5. Two children surviving—Mary Jane and Henry W.; no descendants of deceased children.

Answer to Int. 6. They were.

Answer to Int. 7. She was married in May, 1850, to Simon B. Buckner, one of the parties to this suit.

Answer to Int. 8. He was married in December, 1861, on the 4th or 5th, to Eva McL. Taylor.

Answer to Int. 9. He is dead. He died at Antietam from wounds received in battle in September, 1862. He was wounded on the 17th and died on the 18th, as I understood and believe.

Answer to Int. 10. He had one child, born after his death, on December 16th, 1862, named Henry W.

Answer to Int. 11. It was.

Ans. to Int. 12. She has again married, in September, 1865; she married Albert G. Lawrence. She now is at Newport and her son with her. I do not know that she has any particular place of residence.

Answer to Int. 13. He left a will.

Answer to Int. 14. I first heard from Mr. Cunningham, who was at the funeral, that there were papers left at Fortress Monroe,
296 Virginia. Mr. Cunningham told me that John Taylor told him there were papers left. Mrs. Kingsbury, my son's wife, then wrote me and sent me a copy of the will, and I have furnished said letter, dated September 28, 1862, and said will (hereunto annexed and marked A).

The next was from Mr. Latrobe, of Baltimore, by letter. I had written him asking why the will was not probated. He sent me a copy of the will and a copy of his (Latrobe's) letter to Col. J. H.

Taylor, dated October 16, 1862, which I here present as part of this deposition (hereunto annexed and marked B). I also received with these a letter from Mr. Latrobe, which I cannot now find. If I find it I will deliver it to the commissioner, to be attached to my deposition.

Answer to Int. 15. I have never seen the original will. Mrs. Lawrence sent me word that she was coming on a visit. I asked her to bring the original will. She, for some cause or other, was detained and did not come at the time. She wrote she would send it by mail, if I wished, as she was not coming.

I did not desire her to send it, for fear of its being lost. After a time she visited me, but said nothing of bringing the will. I made no answer to her proposal to send it by mail.

Answer to Int. 16. I have already answered this in my answer to Int. 14.

297 Answer to Int. 17. I did, to Mrs. Buckner, in the fall of 1866, on her first visit here after the war. I gave her a copy of the one I had.

Answer to Int. 18. On the first opportunity of seeing her. It was the first time I had seen her since.

Answer to Int. 19. In August or September, 1861, here in Old Lynn, I had a conversation with my son. I asked him in regard to his sister's property, whether it had been turned over to him, (Henry) and told him Simon had told me so. He replied, "That is so, but don't look concerned; it is only turned over to me for safe keeping; it will be restored to her."

I had another conversation with him in December, 1861, when he was here with his bride. He arrived on the 9th and left on the 11th. The conversation was on the 10th. He then made the same remark, that the property would all be restored to her. I then asked him who was to see — it. He replied, "If I am taken away and General Burnside lives he will see to it for you, that Mary's property is restored to her." He says, "I am going to make my will; am going to give you twenty thousand dollars, to do what you please with at your death—I mean mine—out of my property, and not my sister's." He said he hoped the war would soon close and Mary would come home and attend to her own property. This was the last time I saw him. The person referred to as "Simon" was Mr. Buckner.

Answer to Int. 20. I believe I have given them all.

Answer to Int. 21. Nothing, except what I have hereinbefore stated.

298 Answer to Int. 22. He wrote me a letter dated October 23, 1861, which I here present as a part of the deposition (hereunto annexed and marked C). It is in his own handwriting and the signature "Henry," which was his custom in writing to me, is in his handwriting.

Answer to Int. 23. I do not remember that any are lost.

Answer to Int. 24. He left property at Waterbury, Connecticut, and in Chicago two lots at the corner of Clark and Randolph streets; the Kingsbury tract, on the north branch of Chicago river, above

Kinzie street; a tract of about two hundred and forty acres about six miles above Chicago, known as the Caldwell reservation. This was all the real estate. There was no personal property that I know of, except clothing and watch and similar articles.

Answer to Int. 25. Never that I know of.

Answer to Int. 26. He did not.

Answer to Int. 27. Nothing more than the property inherited.

Answer to Int. 28. Not that I know of.

Answer to Int. 29. He was born at Chicago the 25th of December, 1836.

Answer to Int. 30. He was with me until he went away to school, which was about 1846 or '47; then to Tarrytown, New York, at school; then at Sing Sing, New York, then to West Point, and from West Point into the army and into the war.

299 Answer to Int. 31. From the Brooklyn, New York, district, upon the recommendation of Mr. Stranahan, member of Congress from that district.

Answer to Int. 32. He was at West Point five years within one month; he graduated in May in order to be sent to the war. He was immediately appointed lieutenant in the regular army and entered into active service.

Answer to Int. 33. My husband was born at Waterbury, Connecticut, in 1797. From school he was appointed cadet at West Point. He was an officer in the U. S. Army, appointed from West Point.

Answer to Int. 34. He entered West Point about 1817 or 1818. I believe he entered the army from West Point. He remained in the army till A. D. 1853 or 1854.

Answer to Int. 35. He was married in 1825.

Answer to Int. 36. None except the army.

Answer to Int. 37. None.

Answer to Int. 38. Nothing further, except that I have a letter from Henry's widow, dated November 4, 1862, which I here present as a part of my deposition, enclosing a copy of a letter to her from Mr. Latrobe, which I also present as part thereof. (Letter and copy annexed and marked "D.") I had a conversation with her about January, 1863, at Washington. In speaking of the property she said she was sorry Henry's wishes could not be carried out, but that the laws were such they could not be; that she should teach her son as he grew up that the property did not belong to him and that he should return it to Mrs. Buckner.

300 *Cross-Interrogatories.*

Answer to cross-int. 1. He died at Washington, D. C., June 26, 1856. I was here at Old Lynn staying temporarily; we had no fixed place of residence.

Answer to cross-int. 2. He was stationed at St. Mary's, Michigan. It was an army station.

Answer to cross-int. 3. He staid at St. Mary's till 1828; from thence to Hancock's barracks in Maine. I was not with him there. In 1830 he was at Fort Gratiot, in Michigan; 1831 or '32 he was at

Fort Niagara, in New York. From there he went to Chicago; in 1833 back to St. Mary's, Michigan; in 1834 to Michilemackinack. (He was at Pittsburgh before we went to Fort Gratiot.) From Michilemackinack we came to New York, and in 1836 went back to Chicago, from which place he was sent to Michilimackinack, leaving me sick at Chicago. This was in 1837. I think he was twice in Maine. We came from Chicago in 1837 to Brooklyn; from thence to Waterbury, Conn., and from thence to Maine for the second time, and from Maine to the Florida war. This was either in 1837 or 1838. He came home in 1840 on sick leave, I think, and went back when he got well. He subsequently came back with his regiment and went to Sackett's Harbor. We were there till 1845; then back to St. Mary's, Michigan. From there he went to the Mexican war, in 1846, and I came to Connecticut and spent the time
301 during the war at Old Lynn, Waterbury, and Brooklyn, New York. At the close of the Mexican war he returned to New York, and on or about the 14th of December, 1848, sailed from New York to California. He returned from California in 1850, about July. I did not accompany him to California, but remained in New York during his absence. After his return he went to Washington to attend to his affairs, and was traveling back and forth. He then went to Detroit, in 1852, and remained there till 1855; then went to Chicago. He remained there a few months, and then came to New York and Waterbury and Old Lynn; then to Waterbury and then to Washington, I think, in March, 1856. He then was taken ill and died.

Answer to cross-int. 4. He returned from the army about 1854. He had no fixed residence at any time, but was then staying at Detroit—detained there by sickness of the family as long as they remained at Detroit. I have just stated where we lived after that time.

Answer to cross-int. 5. He was temporarily detained there by sickness, as I have stated, for nearly three years. We did not keep house there; we were boarding at a public house—the "Michigan Exchange." We owned no house.

Answer to cross-int. 6. At New York city; about fifteen years.

Answer to cross-int. 7. First at Waterbury, during the summer and fall after his death; from there to Lynn, where I spent the winter. In the spring of 1857 I went to Nashville, Tennessee,
302 where I stayed with my daughter till the fall of 1857; then came to Brooklyn, New York, at my sister's. In March or April, 1858, went to Kentucky, and then returned to Old Lynn, Conn., during the winter of '58 and '59, where I have remained ever since, except for occasional visits.

Answer to cross-int. 8. I was staying at Old Lynn, Conn. I did not consider it my home.

Answer to cross-int. 9. He was not living with me at that time. He was at school at Sing Sing; had been there three or four years.

Ans. to cross-int. 10. He was not immediately appointed. He took command of the 11th Regiment, Conn. Volunteers, in July,

1862. He received the appointment a short time before from Governor Buckingham, of Connecticut. He served till his death.

Answer to cross-int. 11. He was, as I have just stated.

Answer to cross-int. 12. I have never done so.

Answer to cross-int. 13. None that I know of.

Answer to cross-int. 14. I have not.

Answer to cross-int. 15. I have not, before or since.

Answer to cross-int. 16. None that I know of.

Answer to cross-int. 17. I owned no residence. There was a small place on the property at Waterbury which was occupied by
303 negroes—a shop that had been turned into a house. It was owned by the heirs of my husband. I never lived in it.

Answer to cross-int. 18. I have already fully stated the times and places. There was no one present but myself and my son.

Answer to cross-int. 19. The only letter I received from him on that subject was dated at Arlington, Virginia, October 23, 1861. I received it at Old Lynn in due course of mail.

Answer to cross-int. 20. I have not stated that any were lost. None were lost that I know of.

Answer to cross-int 21. There are none such that I know of. I have examined all my papers to see if there was any such, but find none.

Answer to cross-int. 22. I have not attempted to give contents of any such letter. I have presented the letter itself (marked "C").

Answer to cross-int. 23. It was not written in reply to any letter, but in reply to a conversation before had and which I have already stated.

Answer to cross-int. 24. I cannot recollect communicating it to any person before now.

Answer to cross-int. 25. I make the same answer to the last question.

JANE C. KINGSBURY.

304 STATE OF CONNECTICUT, }
County of New London, } *ss:*

I, James Griswold, of the town of Old Lynn, in the county of New London and State of Connecticut, a commissioner duly appointed to take the deposition of Jane C. Kingsbury, a witness whose name is subscribed to the foregoing deposition, do hereby certify that previous to the commencement of the examination of the said Jane C. Kingsbury as a witness in the suits between the said Henry W. Kingsbury, complainant, and Ambrose E. Burnside and others, defendants, to the bill of complaint, and Mary K. Buckner and Simon B. Buckner, complainants, and Henry W. Kingsbury and others, defendants, to the cross-bill, she was duly sworn by me as such commissioner to testify the truth in relation to the matters in controversy between the said complainants and defendants as far as she should be interrogated concerning the same; that the said deposition was taken at the dwelling-house of John Cunningham, in the town of Old Lynn and county of New London and State of Connecticut, on the 20th day of December, A. D. 1870, and that after said deposition

was taken by me as aforesaid the interrogatories and answers thereto, as written down, were read over to the said witness, and that thereupon the same was signed and sworn to by the said defendant before me at the place and on the day and year last aforesaid.

JAMES GRISWOLD,
Commissioner.

305 EXHIBIT A.

WASHINGTON, *Sept. 28th*, 1862.

MY DEAR MOTHER: I know not how to write you, mother. Mother, what shall we do—what will we do—without him? All I can think is that he is gone, gone, gone. Why was he taken? I can't be resigned. I can't say "Thy will be done." I can only wish for him, long for him, and weep for him. He was so pure, so noble; no one but us know how pure he was. I am coming to you; I want to be with you. I hope to start by the first of next month for Lynn; then I can talk to you and tell you all I want to.

I send you a letter from Mr. Flagler; please return it to me. I will write again soon. Please love me for his sake.

Your daughter, EVA.

I send you a copy of a paper written by Henry and left in my mother's charge just before he started on the Campaign of the Peninsula. I will send you every letter I received telling me of Henry, and indeed, indeed, mother, I will try and be a daughter to you.

EVA.

306 A.

Expecting soon to start upon a military expedition where death may overtake me, I leave this as a record of my wishes respecting the disposition of my property:

"To my mother, Jane C. Kingsbury, I leave twenty thousand dollars, or so much of my Chicago property as upon fair appraisal may be valued at that amount.

"To my sister, Mary J. Buckner, I leave so much of the Chicago property held in my name as shall amount to one-third of the property in the city of Chicago, Ill., left by my father, Julius J. B. Kingsbury, deceased.

"To my cousin, John J. D. Kingsbury, I leave my property in Waterbury, Connecticut, and, in addition thereto, five thousand dollars, which I trust he will expend in completing his education. The remainder of my property of every description I leave to my devoted wife, Eva. I desire, moreover, that the provisions of this will may be so carried out that the yearly income of my wife for her own personal support shall never be less than two thousand dollars ($2,000).

"As executors I name Gen. Ambrose E. Burnside, of Rhode Island, and Capt. John Taylor, com. dep't U. S. army."

Signed at Fortress Monroe, Va., March 25th, 1862.

HENRY W. KINGSBURY,
First Lieutenant 5th Reg't Artillery, U. S. Army.

307 B.

BALTIMORE, *Oct. 16th*, 1862.

To Col. J. H. Taylor.

MY DEAR COL.: I have very carefully considered the paper which you left with me, purporting to be the will of the late Colonel Henry W. Kingsbury, and have gone over the statutes and reports of the State of Illinois in this connection.

I am sorry to have to say that the papers are inoperative. In the case of Rigg *vs.* Welton, 13th Illinois Reports, page 15th, it is decided, in conformity with the 109 ch. of the revised statutes, that "it is indispensable to the validity of a will that it should be signed by the testator or by some one in his presence or by his direction, and attested in his presence by two witnesses."

Wanting in this last most essential requisite, the will which Colonel Kingsbury has left is of no force in law, and his estate must be regarded as that of an intestate or person dying without a will.

In this state of affairs it becomes interesting to your sister to know what are her rights to her late husband's property and what course she should pursue in regard to it, and as you asked my opinion in these respects I proceed to give it.

Going again to the Illinois reports of cases actually decided, I find in Tyson *vs.* Postlewaite, 13 Ills., 727, that "when a man dies intestate, leaving a widow, but no descendants (which is your sis-
308 ter's present case), the widow inherits, as heir of the intestate, one-half of the real and all of the personal estate of which her husband died seized (possessed) which shall remain after payment of his debts, and she is also entitled to dower" in the other half—that is to say, your sister would be entitled absolutely to one-half her husband's land and houses and rents and to one-third of the other half for her life, while all his stocks, bonds, monies, etc., would belong to her absolutely after his debts, if he left any, were paid.

But if the intestate leaves a child or children, and a child born after his death is to be regarded as though born in his lifetime, then, as decided in the case of Sesk *vs.* Smith, 1 Gilman's Illinois Reports, p. 503, "the widow of the deceased husband is entitled to one-third part of his real estate (land, etc.) for life, and also to one-third part of his personal estate (stocks, etc.) forever which remains after payment of all just debts and claims against his estate." The rest of the intestate's estate would belong to the child or children.

In order to cover the entire ground of one conversation it is proper to add, looking to possibilities that were a child to be born and die before arriving at years, to dispose of and disposing of its property

the Revised Code of Illinois, ch. 109, 3–46, provides that where there shall be no children of the intestate nor descendents of such children, and no widow, "then the property goes to the parent's brothers and sisters of the deceased person and to their de-
309 scendants in equal parts between them."

In other words, were your sister to have a child who died during minority she would take her dower now and the whole estate, as the child's heir, at its death.

I am not sufficiently acquainted with the situation of Col. Kingsbury's property to say how your sister's interest in it, under the laws of Illinois, would differ from that designed for her by Col. K. in the several contingencies here referred to.

But, so far as I understand it, her interest, in any event, will be very large, and in one event even larger than her husband contemplated.

As matters stand, however, she is certainly in no condition to determine upon any course in regard to the wishes expressed by him, and I would advise that she neither say nor do anything to commit herself.

By the laws of Illinois your sister is entitled to administer upon her husband's estate. I would counsel her, if this case be managed, to do so by all means. She will then have the whole business in her own hands.

But before she determines upon this even she should have a statement of what his property consists of. Some one must have this if not in Col. K.'s paper, and it should be obtained.

The will falling to the ground, the appointment of executors which it makes falls also. If she pleases, however, she can either renounce her right to administer in favor of the executors named or be united with one or both of them.

310 Begging you to express to your sister my most sincere and affectionate sympathies and my willingness to do everything that can be done to aid her, I am, dear Colonel,

Faithfully yours, JOHN H. B. LATROBE.

Expecting soon to start upon a military expedition where death may overtake me, I leave this as a record of my wishes respecting the disposition of my property:

To my mother, Jane C. Kingsbury, I leave twenty thousand dollars, or so much of my Chicago property as upon fair appraisal may be valued at that amount.

To my sister, Mary J. Buckner, I leave so much of the Chicago property held in my name as shall amount to one-third of the property in the city of Chicago, Ills., left by my father, Julius J. B. Kingsbury, deceased.

To my cousin, John J. D. Kingsbury, I leave my property in Waterbury, Conn., and, in addition thereto, five thousand dollars, which I trust he will expend in completing his education.

The remainder of my property of every description I leave to my devoted wife, Eva. I desire, moreover, that the provisions of this will may be so carried out that the yearly income of my wife for

her own personal support shall never be less than two thousand dollars ($2,000).

As executors I name Gen. Ambrose E. Burnside, of Rhode Island, and Capt. John Taylor, commissary department, United States Army.

311 Signed at Fortress Monroe, Va., March 25, 1862.

HENRY W. KINGSBURY,
First Lieutenant Fifth Regiment Artillery, U. S. Army.

C.

ARLINGTON, VA., *October* 23*rd*, 1861.

MY DEAR MOTHER: I spent all the morning with Burnside yesterday. He states, as I told you, that Simon had made over all the Chicago property that was held in his name to me. A new power of attorney is therefore necessary from you and myself. We made one out. I signed it. Burnside will send it to you. I send you a copy for your own keeping and keep one for myself.

Burnside will arrange to pay Mr. Cunningham semi-annually, as you desired. It pinches him a little just now, as it is unexpected. Still he will send two or three hundred dollars now, and hereafter make his arrangements to pay semi-annually. Burnside was much surprised to learn that you had not received all your allowance. He will send it to you soon. It was a piece of negligence on the part of his agent.

Should anything happen to Burnside and myself you will look to his wife in all business matters. She is acquainted with
312 his affairs. Her address: Mrs. Mary R. Burnside, Providence, Rhode Island.

Should anything happen to her, too, you will call on Burnside's agent, William W. Bishop, of Providence. He states that he has paid all the interest due for sums borrowed up to this time.

I have a good joke on you. Yesterday I was invited to a dinner party at Col. Taylor's. I called just before dinner and excused myself. Mrs. Taylor looked unusually nice. I complimented her on her appearance. "Why," said she, "it is the same old dress I always wear. I have only one that is fit to look at." It reminded me so much of yourself that I could not help smiling. She is a lady that lives in Washington, the very top of society, giving dinner parties every week or two, has one daughter just married, another on the highway to it, her husband chief of the Commissary Department, yet she has but one nice dress and still does not complain of want of clothes. She wears it on all occasions. Mrs. McDonald is the same way. I notice the same black silk on all grand occasions and the same plain morning dress ordinarily. Still she comes to Washington to see the General and stays a month at a time. Since your lamentations I have noticed dress more than usual. I find it the same with all the ladies. I am beginning to think I should have felt proud of you instead of ashamed if you had come on with me.

The authorities positively refuse to let me take command of the Connecticut regiment, so I relapse into a lieutenant again.

313 I am delighted that my descriptions pleased Mr. Brainard so much. I have some maps here that will be of service, I think. I will send them to him. Remember me most kindly to him and his wife.

With much love to aunt and Mrs. C., believe me, dear mother,
Your affectionate HENRY.

Never mind the horse blankets; I'm provided in that way. The cloak will, I fear, prove more of a hindrance than an assistance. I must have a coat for riding.

D.

WASHINGTON, *November 4th*, 1862.

MY DEAR MOTHER: I commenced writing to you some days ago; interrupted by my mother being taken suddenly very sick. She is now, I hope, a little better, but still requires my constant attention. The handkerchief and Uncle Walter's letter came safely to hand. Please thank him for both.

I hope ere this Aunt Camelia has received the book. The picture you asked me to have painted for you will be finished in a few days. I will send it to you as soon as it is finished.

I wrote you I had sent to General Burnside for the money he owes you. He sends me by my brother-in-law the check for

314 $375.00, which I enclose, saying he would soon send you the rest, and you may be sure I will not let him forget it. He owes you now, you will find by looking at your book, $1,325.00 instead of $1,700.00 (which is the amount due to you for the years 1861 and 1862).

My brother-in-law says in a letter received from him this morning that Burnside promises to send you the rest soon—very soon. I will put him in mind of it constantly. Mr. Latrobe has been to see me. He will put everything straight right away. He has written to Burnside for a statement of everything. I send you a copy of a letter I wrote to Burnside. Mr. Latrobe used to be in the army. He was at West Point with your husband, and they were great friends.

He says that the will cannot be made valid, but he tells me, at the same time, that I can give Mary everything she is entitled to. I am very anxious to have everything fixed before next March, so much depends on my child. If it lives it will inherit everything, but I will be its guardian and can act for it until it becomes of age. If it lives but for one moment, if it just breathes or shows signs of life and then dies, I, as its heir, inherit everything from it.

I wish you could hear Mr. Latrobe talk; he makes everything so plain. I have put everything in his hands, giving him for his guide Henry's will. I have tried to do, further, as I think my husband would wish me to, and, from what you said to me when in

Brooklyn, I think I am doing as you would if you were here.
315 If there is anything that you want me to do, or anything that I have done that you do not approve of, do not hesitate to tell me. I send you also a copy of the letter I wrote to Mr. Latrobe.

Do not forget that you are to come to me early in December. Ma says if she were well enough she would write to you herself to tell you how welcome you will be, but, as she is not, you must take the assurance through me. She does want to know you so much. She loved my husband as if he had been her own son. Henry, when we talked of your coming to us, would say so often, "Oh, Eva, I know our mothers will love each other."

I will write to you again very soon. All send best love to you. Give my very best — to Aunt Camelia and Uncle Walter. Sister Belle and ma were delighted with those furs.

The toy horse was found the next morning and is put safely away until Christmas. Ma still thinks the doll the prettiest doll the world ever saw.

Now good-bye. Write to me soon.

Your affectionate daughter, EVA.

Please excuse the looks of my letter, but I am interrupted constantly.

E. K.

316 *Copy of Letter to Mr. Latrobe.*

WASHINGTON, *Oct.* 29, 1862.

MY DEAR MR. LATROBE: I am about to take advantage of your kind offer to attend to my business affairs and to ask you to become my legal adviser and show me the proper way of carrying out my husband's plans and wishes. You know, of course, that I am perfectly ignorant of all the forms necessary.

I would like to see you at your earliest convenience, for I can talk more plainly than I can write, and am very anxious to have everything settled at once.

My sister and her little boy unite with me in love to Mrs. Latrobe and all at Fairy Know.

Sincereily yours, EVA KINGSBURY.

The following deposition and exhibits of Ambrose E. Burnside, to wit:

STATE OF ILLINOIS, } *ss:*
County of Cook, }

The People of the State of Illinois to J. F. Roberts, Esq., or D. McLean Shaw, Esq., of the city of New York, in the county of New York, State of New York, or to any judge or justice of the county of New York:

317 Whereas it has been represented to us that Ambrose E. Burnside is a material witness in a certain cause now de-

pending in our circuit court of Cook county, in and for the county of Cook aforesaid, between Henry W. Kingsbury, complainant, and Ambrose E. Burnside and other defendants to the bill of complaint, and Mary K. Buckner and Simon B. Buckner, complainants, and Henry W. Kingsbury and other defendants to the cross-bill, and that the said witness resides at New York aforesaid, without the said State of Illinois, and that his personal attendance cannot be procured at the trial of the said cause:

Now know ye that we, in confidence of your prudence and fidelity, have appointed you commissioner to examine the said witness, and do therefore authorize and require you to cause the said witness to come before you, at such time and place as you may therefor designate and appoint, and diligently to examine the said witness on the oath or affirmation of the said witness, by you first duly in that behalf administered, and faithfully to take the deposition of the said witness upon all interrogatories inclosed with or attached to these presents, both on the part of the said plaintiffs and of the said defendants, and none others, and the same, when thus taken, together with this commission and the said interrogatories, to certify unto our said circuit court of Cook county with the least possible delay.

Witness Norman T. Gassette, clerk of our said court,
318 [L. S.] and seal thereof, at Chicago, in said county, this 6th day of December, A. D. 1870.

NORMAN T. GASSETTE, *C'*

318 STATE OF ILLINOIS, } ss:
Cook County, }

In the Circuit Court of Cook County.

HENRY W. KINGSBURY, by His Next Friend, CORYDON BECKWITH, *vs.* AMBROSE E. BURNSIDE, JANE C. KINGSBURY, Mary J. Buckner, Simon B. Buckner, John J. D. Kingsbury, Eva Lawrence, and Albert G. Lawrence.	Bill of Complaint. In Chancery.
MARY K. BUCKNER and SIMON B. BUCKNER *vs.* HENRY W. KINGSBURY, EVA LAWRENCE, Albert G. Lawrence, and Jane C. Kingsbury.	Cross Bill.

To the complainants in the said original bill of complaint and the defendants to said cross-bill and their solicitors:

Take notice that on the sixth (6th) day of December, A. D. 1870, at ten o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, the undersigned will sue out of the
319 office of the clerk of the circuit court of the county of Cook aforesaid a *dedimus protestatum* or commission, under the

seal of said court and directed to J. F. Roberts or D. McLean Shaw, Esq., of the city of New York, in the county of New York, or to any judge or justice of the peace of the county and State last above mentioned, to take the deposition of Ambrose E. Burnside upon the interrogatories hereto attached, to be read in evidence on the part of the complainants in said cross-bill and defendants to said original bill on the hearing of the above-entitled cause, now pending in the said circuit court on the chancery side thereof, when and where you can appear and file cross-interrogatories and join in said commission if you so wish.

Dated this twenty-fifth day of November, A. D. 1870.

GOUDY & CHANDLER,
Solicitors for said Complainants in said Cross-Bill, etc., etc.

We hereby acknowledge service of the foregoing notice and attached interrogatories by a copy thereof this twenty-fifth day of November, A. D. 1870, and consent the commission may issue at the time named above, longer notice being hereby waived.

BECKWITH, AYER & KALES,
Solicitors for Albert G. and Eva Lawrence.

JAMES E. MONROE,
Of Counsel for Jane C. Kingsbury.

320 C. BECKWITH,
Guardian ad Litem, Next Friend for Henry W. Kingsbury.

Interrogatories referred to in the foregoing notice and to be answered by Ambrose E. Burnside, a witness to be produced, sworn, and examined under and by virtue of the annexed commission, before J. F. Roberts, Esq., or D. McLean Shaw, Esq., or any judge or justice of the peace of the said county and State last mentioned in the within notice, in the cause therein mentioned and referred to, and now pending in the circuit court of Cook county, Illinois, in chancery, wherein Henry W. Kingsbury is complainant in the original bill of complaint and Ambrose E. Burnside, Jane C. Kingsbury, Mary J. Buckner, Simon B. Buckner, John J. D. Kingsbury, Eva Lawrence, and Albert G. Lawrence are defendants thereto, and wherein Mary K. Buckner and Simon B. Buckner are complainants in the cross-bill and Henry W. Kingsbury, Eva Lawrence, Albert G. Lawrence, and Jane C. Kingsbury are defendants thereto, on the part and behalf of said complainants in said cross-bill and the defendants, Ambrose E. Burnside, Jane C. Kingsbury, Mary J. Buckner, Simon B. Buckner, and John J. D. Kingsbury, to said original bill, as follows, to wit:

Interrogatories to be proposed to Ambrose E. Burnside on the part of the defendants (except Albert G. Lawrence and Eva Law-
321 rence) to the original bill and the complainants to the cross-bill.

1. What is your name, age, and residence?
2. Are you one of the defendants in this case?

3. Are you acquainted with the parties in this suit; and, if yea, how long have you known them, respectively?

4. Were you acquainted with Henry W. Kingsbury, son of Major Julius J. B. Kingsbury, in his lifetime; and, if yea, how long did you know him?

5. Did you ever have the management of the estate of Major Julius J. B. Kingsbury, situated in Chicago, Illinois? And, if so, state when such management commenced, when it ended, and by what arrangement you entered on the same, stating also the time when and with whom such arrangement was made.

6. What disposition was made of the proceeds or rents and profits of the property while it was under your control?

7. Was there any change of such application of the rents and profits after the 15th day of May, 1861, from the course of business before that date?

8. Did Henry W. Kingsbury at any time in his lifetime, within your knowledge, receive all the rents and profits or the net proceeds of the same?

9. Do you know of any claim or acts of ownership by said
322 Henry W. Kingsbury over said property after the 15th day of May, 1861, indicating that he was the sole owner of said property in Chicago, subject only to the right of dower of his mother and the incumbrances? And, if yea, state fully all you know ab[illegible] such claim or acts.

10. When and where did Henry W. Kingsbury die? S[illegible] cause and circumstances of his death. What was his rank army at that time?

11. Was you an officer in the army at that time; and, if [illegible] what? Please give the command held by you at the battle of Antietam. Was said Henry W. Kingsbury under your command?

12. Did you have any conversation with Henry W. Kingsbury after he was wounded, in regard to his property or business? And, if so, state fully each conversation.

13. Are you one of the persons named as executor of the will of said Henry W. Kingsbury?

14. State fully when you first learned of the existence of contents of said will, when you first obtained possession of the same, and the reasons why it was not sooner presented for probate.

15. Was any opposition made to a delivery of the will to you as an executor; and, if so, who made the objection? And state all you know in regard thereto.

16. What declarations or statements did Henry W. Kingsbury make, if any, in regard to Mrs. Buckner's share of the property descended from his father and located in Chicago after May 15, 1861?

323 17. Who succeeded you in the management of the Kingsbury estate in Chicago, and when?

18. Did Henry Kingsbury, within your knowledge, ever hold in his own name any property in Chicago for the use or benefit of any person, except by the deed of May 15, 1861, executed by Mrs. Buckner and her husband; and, if so, what was it?

19. Did you ever have the possession of said deed from Mrs. Buckner or her husband to Henry W. Kingsbury, dated May 15, 1861?

20. Did Henry W. Kingsbury ever have possession of such deed, so far as you know?

21. What was the value of Mrs. Buckner's share of the Kingsbury estate May 15, 1861?

22. Did Henry W. Kingsbury ever acquire any real estate by purchase, within your knowledge; and, if so, what was it?

23. How long did you reside in Chicago? Please give the time when you entered the army.

24. If you had the management of the Kingsbury estate for the heirs after you left Chicago, state the manner in which you did so and the name of your agent.

25. Were you acquainted with the handwriting of Henry W. Kingsbury, deceased?

26. Have you seen the original will of said Henry W. Kingsbury; and, if so, did you make or cause to be made a copy thereof? And, if you did, look at the paper hereto attached, marked "Exhibit A," and state whether or not the same is a true copy of the original.

324 27. In whose handwriting is the original of which "Exhibit A" is a copy? Is the signature thereto the genuine writing and signature of the said Mary W. Kingsbury?

Where is the original bill?

What estate did said Henry W. Kingsbury have, if any, at ıdria, Virginia, when said will was admitted to probate?

Please state any other matter or thing material to the controversy in this suit.

GOUDY & CHANDLER,
Solicitors for said Complainants in said Cross-Bill, &c.

EXHIBIT A.

"Expecting soon to start upon a military expedition where death may overtake me, I leave this as a record of my wishes respecting the disposition of my property:

"To my mother, Jane C. Kingsbury, I leave twenty thousand dollars, or so much of my Chicago property as upon fair appraisal may be valued at that amount.

"To my sister, Mary J. Buckner, I leave so much of the Chicago property held in my name as shall amount to one-third of the property in the city of Chicago, Ill., left by my father, Julius J. B. Kingsbury, deceased.

"To my cousin, John J. D. Kingsbury, I leave my property in Waterbury, Connecticut, and, in addition thereto, five thousand dollars, which I trust he will expend in completing his education.

325 "The remainder of my property of every description I leave to my devoted wife, Eva. I desire, moreover, that the provisions of this will may be so carried out that the yearly income of

my wife for her own personal support shall never be less than two thousand dollars ($2,000).

"As executors I name Gen. Ambrose E. Burnside, of Rhode Island, and Capt. John Taylor, Com. Dep't, U. S. Army."

Signed at Fortress Monroe, Va., March 25th, 1862.

HENRY W. KINGSBURY,
First Lieutenant 5th Reg't Artillery, U. S. Army.

Counsel for Mrs. Eva Lawrence object to direct interrogatories numbered 5, 6, 7, 8, 9, 12, 13, 14, 15, 16, 17, 18, 21, and 22, propounded to Gen. Ambrose E. Burnside, and to each of them severally, as immaterial and incompetent, and propose the following cross-interrogatories to be answered by the said witness:

Cross-int. 1. When and where did you enter the military service of the United States, in which you were engaged during the late civil war?

Cross-int. 2. Were you or not appointed colonel of a Rhode Island regiment which was mustered into the service of the United States in 1861, soon after the outbreak of the late rebellion; if yea, when did you receive such appointment and when did you enter upon the discharge of its duties?

326 Cross-int. 3. Did you have anything to do personally either with the collection or the disbursement of the rents and profits of the Kingsbury estate in Chicago after the 15th of May, 1861?

Cross-int. 4. Have you any personal knowledge respecting the dispositions made of the rents and profits of the said estate after May 15th, 1861?

Cross-int. 5. Was not all your time occupied after May 15th, 1861, down to the death of the late Henry W. Kingsbury by your military duties?

Cross-int. 6. Did the said Henry W. Kingsbury have command of a regiment of troops in the United States service at the time of his death; if yea, of what regiment, and when and by whom was he appointed to such command?

Cross-int. 7. At whose suggestion or by whose request did you present the paper purporting to be in the nature of a last will and testament of Henry W. Kingsbury for probate in the State of Virginia?

Cross-int. 8. Did you have anything to do with the presentation of said paper for probate in the State of Virginia; if yea, what and at whose request?

Cross-int. 9. Was any effort made by the friends of the late Henry W. Kingsbury after his death, so far as you know, to secrete the said paper or conceal the fact of its having been executed?

Cross-int. 10. Was not the fact of the existence of such a
327 paper communicated to or known by you soon after the said Henry W. Kingsbury's death; if yea, how soon after, and who had possession of the said paper, and what was done with it?

B. F. AYER,
Of Counsel for Eva Lawrence.

Cross-int. 11. If you shall state that the said Henry W. Kingsbury had any estate or effects in the State of Virginia when the said illegal will was admitted to probate, you will please describe the same fully. Please state how you know that the said effects belonged to the said Henry W. Kingsbury. When did you see the said effects? And state, if you know, how they happened to be in Alexandria. Did the said Henry H. Kingsbury leave them there; if so, when? Were they at Alexandria at the time of his death, or how otherwise? Do you know who brought the said effects to Alexandria; if yea, who was it?

Cross-int. 12. Have you any reason to believe, and do you believe, that the said effects were brought to Alexandria after the said Henry W. Kingsbury's death? If yea, state the reasons for such belief, and who it was you suppose took them there.

B. F. AYER,
Of Counsel for Eva Lawrence.

The deposition of Ambrose E. Burnside, of the county of New York and State of New York, a witness of lawful age produced, sworn, and examined upon his corporal oath, on the twenty-sev-
328 enth day of December, in the year of our Lord one thousand eight hundred and seventy, at the office, No. 26 Exchange Place, in the city of New York, in the county of New York and State aforesaid, by me, J. F. Roberts, a commissioner duly appointed by a *dedimus potestatum* or commission, issued out of the clerk's office of the circuit court of Cook county, in the State of Illinois, bearing teste in the name of Norman T. Gassette, clerk of said circuit court, with the seal of said court affixed thereto, and to me directed as such commissioner for the examination of the said Ambrose E. Burnside, a witness in a certain suit and matter in controversy, now pending and undetermined in the said circuit court, described in the annexed commission, upon the interrogatories which were attached to or inclosed with the said commission and upon none others.

The said AMBROSE E. BURNSIDE, being first sworn by me as a witness in the said causes, previous to the commencement of his examation, to testify the truth as well on the part of the plaintiffs as the defendants in relation to the matters in controversy between the said plaintiffs and defendants so far as he should be interrogated, testified and deposed as follows:

Answer to interrogatory 1. My name is Ambrose E. Burnside; I am 46 years of age, and reside at Providence, Rhode Island. I have an office and transact business at 26 Exchange Place, in this city.

329 Answer to Int. 2. I am one of the defendants in this suit.

Answer to Int. 3. I am acquainted with all the parties to this suit, except the child, Henry W. Kingsbury. I have known Simon B. Buckner since the year 1843 and Mrs. Buckner since about the year 1850, and Mrs. Kingsbury since the year 1858, and John

D. Kingsbury since the fall of 1869. Mrs. Lawrence I have known since about 1851, and her husband, Albert G. Lawrence, since about 1865.

Answer to Int. 4. I was acquainted with Henry W. Kingsbury, deceased. I think I knew him about six years—from 1856 to the time of his death.

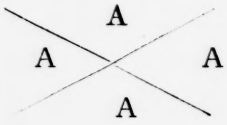
Answer to Int. 5. Yes; the management commenced in 1858 and extended to December, 1862. The first arrangement was made in 1858 with Simon B. Buckner, who was then sole agent of the estate. Afterwards I received a power of attorney from Simon B. Buckner and his wife and Mrs. Jane C. Kingsbury and Henry W. Kingsbury. The power of attorney I have just spoken of was given about December, 1859.

Answer to Int. 6. The income of the estate was applied by me in the payment of interest, taxes, repairs, &c., and the payment of the different parties in interest. These last were Mrs. Jane C. Kingsbury, Simon B. Buckner and wife, and Henry W. Kingsbury.

Answer to Int. 7. There was not, except that I do not remember to have paid anything to General or Mrs. Buckner after that date.

330

J. F. R.



Answer to Int. 8. No; he did not, as far as I know.

Answer to Int. 9. I know of nothing unless it is the will in question.

Answer to Int. 10. Henry W. Kingsbury was mortally wounded at the battle of Antietam, on the 17th day of September, 1862, and died on the 18th of September, 1862. He was colonel of the Eleventh Connecticut Volunteers and first lieutenant of the Fifth United States artillery, regular service.

Answer to Int. 11. I was major general of volunteers at that time and commanded the left wing of the Army of the Potomac at the battle of Antietam, and Henry W. Kingsbury was under my command.

Answer to Int. 12. I did. When the information came to me that he was wounded I went to see him. He told me that he feared he was mortally wounded, and requested that he should not be moved from the place he was in. He also requested me to look after the interests of his wife, mother, and sister. I asked if he had any instructions to give me. He said, in substance, that he had already left the necessary directions as to his affairs, as I would see in future.

331 Answer to Int. 13. I am.

Answer to Int. 14. I first learned of the existence of the will from Mrs. Buckner in 1866 or 1867. It was in the fall of 1866.

I now remember she gave me a copy of the will, which had been sent to her mother. I first saw the original will on the 12th day of June, 1869, in the possession of R. G. Hazard, Esq., at No. 110 Broadway, New York city. I first obtained possession of the original will about the 1st May, 1870, and the reason it was not sooner presented for probate was because it was not in my possession, and I presented it as soon as I obtained possession of it. As soon as I learned the whereabouts of the will I endeavored to get possession of it.

Answer to Int. 15. There was made opposition by attorneys representing Henry W. Kingsbury or Mr. Beckwith, his attorney, but the surrogate decided to give me the will.

Answer to Int. 16. I remember that we had conversations, and I think it was in October, 1861, in reference to the property, but I cannot remember the substance of conversations.

Answer to Int. 17. John H. B. Latrobe, in December, 1862.

Answer to Int. 18. No.

Answer to Int. 19. No.

Answer to Int. 20. No.

Answer to Int. 21. $400,000 or $500,000.

Answer to Int. 22. None that I know of.

332 Answer to Int. 23. I resided in Chicago eighteen months. I think I left in the fall of 1859. I re-entered the army in April, 1861.

Answer to Int. 24. I had the management of the estate after I left Chicago up to the time I turned it over to Mr. Latrobe. The details of the work in Chicago was all done by D. W. Mitchell.

Answer to Int. 25. I was and am.

Answer to Int. 26. I have. I had a copy made, and the annexed paper marked "Exhibit A" is a true copy of the original will. I also had a photographic copy of the will made, which copy I desire to present as "Exhibit B" and annex to this my deposition.

Answer to Int. 27. Both body of the will and signature are in the handwriting of Henry W. Kingsbury.

Answer to Int. 28. On file in corporation court of the city of Alexandria, Virginia, where it was proved.

Answer to Int. 29. I was informed by my attorney that there was personal property belonging to the estate, and there were moneys to which the estate had a claim.

Answer to Int. 30. I remember nothing else just now.

333 *Cross-Interrogatories.*

Answer to cross-int. 1. In April, 1861, in the State of Rhode Island.

Answer to cross-int. 2. I was. I received the appointment and entered upon the discharge of duty in April, 1861.

Answer to cross-int. 3. I had.

Answer to cross-int. 4. I have.

Answer to cross-int. 5. It was. I gave directions as to my private affairs, and also with reference to the affairs of this estate.

Answer to cross-int. 6. Yes; he commanded the 11th Connecticut. He was appointed by the Governor of Connecticut, as all volunteer officers of regulars were appointed, and afterwards was mustered into the United States service.

Answer to cross-int. 7. My action in the matter was taken by request of Mrs. Jane C. Kingsbury, Mrs. S. B. Buckner, and John J. D. Kingsbury.

Answer to cross-int. 8. I directed my attorney to have the same proved in consequence of the request of parties just named and with a view of carrying out the wishes of the late Col. Kingsbury and because I desired to see justice done to all parties concerned.

Answer to cross-int. 9. Not to my knowledge, although it was not brought to my notice by parties having possession of will.

334 Answer to cross-int. 10. It was not brought to my notice until some time after his death. The first copy of the will that I ever saw was handed me by Mrs. Buckner, in the presence of her mother, in the fall of 1866. The first knowledge I had of the whereabouts of the original will was in 1869, when I learned that it was in the possession of Mr. R. G. Hazard, of New York city, who told me that he claimed to hold it for Mrs. Lawrence, and he said he would only give it up on her order.

Answer to cross-int. 11. I was informed by my attorney that there was property and effects there belonging to the estate of Henry W. Kingsbury. He showed me papers representing them. They were not left there by Henry W. Kingsbury. There was a deposit of money at Alexandria, Virginia, in addition to effects spoken of, which belonged to General S. B. Buckner, which my attorney attached in a suit against said Buckner for a claim due said estate. There was also a deposit there made by me, as executor, to cover all the expenses of legal proceedings. Both these deposits still remain there. I do not know how the other effects came there.

Answer to cross-int. 12. I believe they were brought there after Henry W. Kingsbury's death. I have already stated that I do not know who took them there, except the deposits, as already stated. I cannot state exact reasons for my belief.

A. E. BURNSIDE.

335 I, John F. Roberts, of the city, county, and State of New York, a commissioner duly appointed to take the deposition of the said Ambrose E. Burnside, a witness whose name is subscribed to the foregoing deposition, do hereby certify that previous to the commencement of the examination of the said Ambrose E. Burnside as a witness in the suits mentioned in the said commission he was duly sworn by me as such commissioner to testify the truth in relation to the matters in controversy between the said parties as far as he should be interrogated concerning the same.

That the said deposition was taken at No. 26 Exchange Place, in the city of New York, in the county of New York and State of New York, on the 22d day of December, A. D. 1870, and that after said deposition was taken by me the interrogatories and answers thereto as written down were read over to the said witness, and that there-

upon the same was signed and sworn to by the said deponent, Ambrose E. Burnside, before me as such commissioner at the place and on the day and year last aforesaid.

JOHN F. ROBERTS,
Commissioner.

336 EXHIBIT B. J. F. Roberts, Commissioner.

Expecting soon to start upon a military expedition where death may overtake me, I leave this as a record of my wishes respecting the disposition of my property.

To my mother, Jane C. Kingsbury, I leave twenty thousand dollars, or so much of my Chicago property as upon fair appraisal may be valued at that amount.

To my sister, Mary J. Buckner, I leave so much of the Chicago property held in my name as shall amount to one-third of the property in the city of Chicago, Ills., left by my father, Julius J. B. Kingsbury, deceased.

To my cousin, John J. D. Kingsbury, I leave my property in Waterbury, Conn., and, in addition thereto, five thousand dollars, which I trust he will expend in completing his education.

The remainder of my property of every description I leave to my devoted wife, Eva. I desire, moreover, that the provisions of this will may be so carried out that the yearly income of my wife for her own personal support shall never be less than two thousand dollars ($2,000).

As executors I name Gen. Ambrose E. Burnside, of Rhode Island, and Capt. John Taylor, commissary department, United States Army.

Signed at Fortress Monroe, Va., March 25, 1862.

HENRY W. KINGSBURY,
First Lieutenant Fifth Regiment Artillery, U. S. Army.

337 The following deposition of D. W. Mitchell and John G. Shortall, to wit:

Be it remembered that on application of Mary K. Buckner and Simon B. Buckner, the complainants in the cross-bill in a suit now pending in the circuit court of Cook county, State of Illinois, wherein Henry W. Kingsbury, by his next friend, Corydon Beckwith, is complainant in the original bill and Ambrose E. Burnside, Jane C. Kingsbury, Mary J. Buckner, Simon B. Buckner, *et al.* are defendants to the original bill, and Henry W. Kingsbury, Eva Lawrence, Albert G. Lawrence, and Jane C. Kingsbury are defendants to the cross-bill, I, S. W. Burnham, official reporter of the courts of Chicago, and authorized to take and certify depositions to any of the courts of the State of Illinois, by virtue of an act of the General Assembly of the State of Illinois approved March 11th, 1869, entitled "An act to amend an act entitled An act for the appointment of official reporters and for the preservation of evidence in certain cases in Cook county," have, this thirteenth day of December, A. D. 1870,

at the office of Ely, Burnham & Bartlett, 93 Washington street, in the city of Chicago and State aforesaid, pursuant to agreement of counsel of all above-named parties, proceeded to examine David W. Mitchell and John G. Shortall as witnesses in behalf of the complainants in the cross-bill and defendants in the original bill, except Albert G. Lawrence and Eva Lawrence in the aforesaid suit, W. C. Goudy, Esq., appearing before me on the part of the complainants in cross-bill and defendants to original bill, except
338 Albert G. Lawrence, Eva Lawrence, and Corydon Beckwith, Esq., on behalf of the said Henry W. Kingsbury, and Beckwith, Ayer & Kales on behalf of Albert G. Lawrence and Eva Lawrence; and I do further certify that this [these] deposition- was [were] taken by agreement between the parties on behalf of Mary K. Buckner, Simon B. Buckner, Ambrose E. Burnside, Jane C. Kingsbury, and John J. D. Kingsbury, who appear by Goudy & Chandler, their solicitors. Corydon Beckwith, guardian *ad litem* for Henry W. Kingsbury, appears for him, and Beckwith, Ayer & Kales, solicitors, appear for Albert G. Lawrence and Eva Lawrence.

And I further certify that the said DAVID W. MITCHELL, being by me fully examined, cautioned, and fully sworn to testify the whole truth, was examined by Mr. GOUDY, and testified as follows:

Q. 1. What is your name, age, and residence?

A. D. W. Mitchell; age, 39, and residence, Chicago.

Q. 2. How long have you resided in Chicago?

A. Fifteen years last March.

Q. 3. What has been your occupation since you have been in this city?

A. I have, generally speaking, been what is termed a real-estate agent.

Q. 4. Did you have any connection with the property which formerly belonged to Major Julius B. Kingsbury? If so, what?

339 A. I had charge of it from November 20, 1860, up to some time during November, 1868, collecting the rents and managing it generally.

Q. 5. What is the property that belonged to that estate?

A. It was lots 5 and 6, in block 35, of the original town of Chicago, Illinois, and a portion on the North Branch of the Chicago river, part of section 19 called the Kingsbury tract.

Q. 6. Can you give any accurate description of the Kingsbury tract?

A. It is bounded on the north by a line 3 feet north of the centre of Ontario street, on the east by Butler, Wright & Webster's Addition, on the south by Kinzie street, and on the west by the North Branch of the Chicago river. The north line was originally ninety feet further north, but the part north of Ontario street was not under my management.

Q. 7. You stated that it was in section 9—in what township and range?

A. 39 N. and 14 E. of the third principal meridian.

Q. 8. What part of the section?

A. All of the east half of the northwest quarter of section 9 east

of the North Branch of the Chicago river, south of Sedgwick's Addition, said addition being about 90 feet north of Ontario street.

Q. 9. Was the property known as the Kingsbury tract embraced in the description contained in a deed, bearing date May 30, 1833, executed by James Kingsbury and wife to Julius J. B. Kingsbury and recorded May 31, 1833, in Book A, p. 139, in Cook county, Illinois?

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A. It was.

Q. 10. For whom did you act when you had management of the property of the Kingsbury estate and collecting rents therefor?

A. Well, I was employed by General Buckner and Henry Kingsbury. They were both present when the engagement was made.

Q. 11. They made the arrangement with you, but did you act for any person but those?

A. I acted for old Mrs. Kingsbury, as I understand it.

Q. 12. And Mrs. Buckner?

A. And Mrs. Buckner.

Q. 13. What was the arrangement made between Henry Buckner and James Kingsbury with you?

A. It was that I should go on and collect the rents and lease the property and pay the taxes, and so forth.

Q. 14. When was the arrangement made?

A. That was made in August, 1860, a day or two before the commencement of the engagement.

Q. 15. Where did General Buckner reside then?

A. I think he was living in Louisville, Kentucky, then.

Q. 16. Where did Henry W. Kingsbury reside?

A. In West Point Academy. General Buckner may have been living in Nashville at the time. He had been living in Nashville. I am not positive which town he was at. My impression is that he was living in Louisville.

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Q. 17. How long did you continue to act under that arrangement?

A. Well, I acted up to May, 1861, I believe.

Q. 18. Was there any change made in 1861, or any new arrangement?

A. Nothing further than to report all my collections and accounts to General Burnside.

Q. 19. To whom did you report your collections before that time?

A. I don't think I made any report at all. When General Buckner was up here he would look over the matters, or when General Burnside was out he looked over them.

Q. 20. Had General Burnside himself control of your actions in regard to the property since 1861?

A. He had; yes, sir. He had control, and I looked upon him or anything he might say as authority.

Q. 21. Did you first find him in the management when you first commenced your duties?

A. He had more or less the management of it.

Q. 22. Did you receive directions from General Burnside?

A. Sometimes.

Q. 23. Did you receive them from General Buckner?

A. Yes, sir; sometimes.

Q. 24. What directions, if any, were given you in May, 1861, by any person? And state who it was, if any were given.

A. General Buckner gave me instructions to report all further collections and business to General Burnside; that he didn't wish to be consulted in the matter any further.

342 Q. 25. How long did you continue to report to General Burnside?

A. Up unto the time that Mr. Latrobe took charge of affairs, which was some time about the first of January, 1863, I believe.

Q. 26. Did you act under Mr. Latrobe?

A. Yes, sir.

Q. 27. For how long?

A. From 1863 to 1868, from the time I commenced; it was somewhere in the neighborhood of the first of January, 1863, or the latter part of December, 1862.

Q. 28. Please state what your exact position was in the management of this property when General Burnside and General Buckner and Mr. Latrobe were over you, and their positions.

A. I had what you may term exclusive control, but my actions were to supervise. Anything that was of any moment—that I considered of any magnitude—before I took a step I would report to them. In small matters, as a lease for a short time, or any small matter, I took action on my own account, but everything else I reported to them. As a general thing, anything I considered of any magnitude before I took action I referred to them; but my action was universally confirmed whenever I did refer to them.

Q. 29. Did you mean to say that General Burnside was the chief agent and you the sub-agent under him?

A. Yes, sir.

343 Q. 30. Was that the same relation you occupied to Mr. Latrobe?

A. Yes, sir. I don't know exactly what Mr. Latrobe's position was. He was agent and attorney, I believe. I don't think he was anything else. He had full authority to control the estate, as I understand it.

Q. 31. Did you remit money to Mr. Latrobe?

A. Yes, sir.

Q. 32. For how long a time?

A. For the whole term for which he was acting as agent.

Q. 33. After you took charge of the property, in 1860, did you make any report or remit any money prior to May, 1861?

A. I made no report. Whether I remitted any money or not I don't know. I don't think I did. The Kingsbury block had just been built, and there were a good many bills back unpaid, and the first rentals from that or the first moneys that were received were used in paying off those bills. General Burnside made a special mission out here from New York to settle up the bills remaining unpaid in the Kingsbury block. It was some time in 1861—the first part of 1861—early in the spring, is my recollection.

By Mr. AYER:

Q. 34. What is the Kingsbury block?
A. The museum, as it is called.
Q. 35. On Randolph street?
A. Yes, sir.

344 By Mr. GOUDY:

Q. 36. What was the amount of rents the property was producing the first year that you had it?
A. I think it was between 12 and 13 thousand dollars.
Q. 37. What was the amount of rents it produced the last year you had charge of it?
A. It was something over 48,000 dollars.
Q. 38. What was the value of the real estate belonging to the heirs of Julius J. B. Kingsbury on the 15th of May, 1861, situated in Chicago, Illinois?

(Objected to as immaterial.)

A. I suppose the property would be worth as much as six hundred thousand dollars.
Q. 39. Would that be a cash value or an asking value of the property?
A. I judge that would have been a cash value. There wasn't much selling there, but I presume that it would have sold for that much, the whole property.
Q. 40. At how much more was it estimated at in the way property was generally rated?

(Objected to.)

A. Well, property was generally rated twenty or twenty-five per cent.—sometimes thirty per cent.—more than what was considered a cash value.
Q. 41. Do you recollect the amount of encumbrance on the property at that time?
A. No, sir.

345 Q. 42. Can you state the approximated amount?
A. About $137,500.
Q. 43. What is the present value of the same property?

(Objected to.)

A. I think it would be worth a million and a half dollars.
Q. 44. Did you ever have in your possession a deed executed by Gen. Buckner and his wife to Henry W. Kingsbury, dated May 15, 1861, conveying an undivided half of this property?
A. Yes, sir.
Q. 45. From whom did you receive it?
A. It was brought to me by a young man named Thomas Mitchell.
Q. 46. From whom did he bring it?
A. He brought it from Gen. Buckner.
Q. 47. Did you receive any directions in regard to its disposition?

A. There was a letter enclosed that instructed me to place it on record.

Q. 48. Where is that letter?

A. The letter is destroyed.

Q. 49. Do you know that it is destroyed?

A. Yes, sir; I done it with my own hands.

Q. 50. What did that letter state?

A. It stated that enclosed was a deed to place on record, and to report all further proceedings to Gen. Burnside; that he didn't wish to be consulted in the matter any further in regard to the management of the Chicago property. That was the exact words of the letter.

346 Q. 51. At what time did you receive this deed and the letter?

A. I think I received it on the 17th day of the month, on the second day afterwards.

Q. 52. What month?

A. May.

Q. 53. 1861?

A. Yes, sir.

Q. 54. What did you do with the deed?

A. I filed it for record in the recorder's office of Cook county, Illinois.

Q. 55. Did you ever see that deed since the time you say you filed it?

A. No, sir.

Q. 56. Did you ever take or authorize it to be taken from the recorder's office?

A. No; I never took it and I never authorized anybody else to take it from the recorder's office.

Q. 57. Do you know where the deed is now?

A. No, sir; I have no knowledge whatever of it.

Q. 58. What property was owned by Henry W. Kingsbury when you took the management of it, in 1860?

A. He owned the undivided half of the Kingsbury tract and an undivided half of these two lots, five and six, in block thirty-five.

Q. 59. The same property you have described?

A. Yes, sir.

Q. 60. What property did Mrs. Buckner own at that time?

347 A. She was supposed to own the other undivided half of the same property.

Q. 61. What interest at that time did Mrs. Jane C. Kingsbury have in this property?

A. She, being the widow of Gen. Julius J. B. Kingsbury, had a dower right interest during her lifetime in the whole property.

Q. 62. Did either Henry W. Kingsbury or Mrs. Buckner have any other property during the time you had charge of the estate or property?

A. None that I am aware of.

Q. 63. Do you know whether or not Henry Kingsbury, during his lifetime, had any other property in Chicago, Cook county, Illinois?

A. I never heard of his having any other.

Q. 64. Were you his sole agent to represent his entire interest as to property in Chicago?

A. So far as I know.

Q. 65. Did you receive any directions from General Burnside or any other person to transfer your reports to Mr. Latrobe?

A. I had a letter from General Burnside with a letter of introduction of Mr. Latrobe to me, and my impression is that there was instructions in that, or rather directions in it, that he would take charge of the property after that time.

Q. 66. Where was General Burnside residing when you took charge of the property in August, 1860?

A. I think he was residing in New York city at that time.

Q. 67. Do you know when he went to New York?

348 A. No, sir; I do not. Near that time; not long before that.

Cross-examination by Mr. AYER:

Q. 1. Who is the gentleman who had charge of the property before you were employed as such in 1860?

A. Well, I don't know much about the property. I don't think there was anybody except General Burnside and General Buckner; both acted in conjunction, one as much as the other, and the other as much as that one.

Q. 2. Did General Burnside reside at Chicago at that time?

A. He had up to a short time before that time. I don't think he was residing in Chicago at the time I took charge of it. He had to a short time before that.

Q. 3. Where was General Buckner residing at the time he transmitted the deed to you of which you have spoken?

A. He was residing in Louisville then; at least, the letter and deed was from there then. He was residing there then.

Q. When did you destroy the letter?

A. About five or six weeks ago—maybe two months, not very long ago—in running over my old papers I found it and tore it up.

Q. 5. Was it before or after the commencement of this suit?

A. I believe it was after the commencement of this suit, some time.

Q. 6. Why did you destroy it?

349 A. Just because I had no further use for it. I was rum--aging my desk and destroying all the old letters I didn't wish to keep, and found this and destroyed it.

Q. 7. Have you stated all you remember of the contents of this letter?

A. Yes, sir; I think I stated everything, word for word.

Q. 8. Do you remember whether any letter-press copy of that letter had been taken before it was sent to you?

A. I don't know whether there had been or not.

Q. 9. How long before you received that deed was it before you saw General Buckner?

A. I hadn't seen him since 4th of March preceding.

Q. 10. When did you see him next afterwards?

A. About last January some time, seven or eight years afterwards.

Q. 11. To whom did you report for instructions after you had filed the deed for record, as you have stated?

A. I didn't make any report. I merely sent the surplus money that I might have. Sometimes General Burnside might draw on me for some money, but I made no detailed report of it during his whole administration—only of the money I sent him, the surplus money I might have on hand.

Q. 12. Did you see General Burnside in Chicago after May 17th, 1861, while you remained agent of this property?

350 A. Well, I saw him once during the war. He was out here during the spring or summer of 1861. Whether it was before the 17th day of May or afterwards that he came out to settle up these outstanding claims against the Kingsbury block, I don't know. My impression is that it was early in the spring; it might have been after that time.

Q. 13. When was the last time that you transmitted to him any funds?

A. That I could not tell precisely; not a great while before Mr. Latrobe took the general management of affairs.

Q. 14. Who is Latrobe?

A. An agent from Baltimore.

Q. 15. State whether or not he is a practicing lawyer in Baltimore?

A. I understand him to be such.

Q. 16. Was he or not employed by the widow of Henry W. Kingsbury to take charge of this property?

A. She informed me so.

Q. 17. How many times did you ever see Henry W. Kingsbury?

A. Never saw him but once in my life.

Q. 18. Where was that?

A. In Chicago.

Q. 19. Did you inform anybody of the receipt of that deed, and of its being recorded?

A. I may have told persons of it, but I don't know anything about it now.

Q. 20. Did General Burnside know of the fact?

351 A. I presume he did; he might from my consulting him.

Q. 21. In what business was General Burnside engaged after May, 1861, while he retained any connection with this property?

A. It was either treasurer or assistant treasurer of the Illinois Central railroad, residing in New York city. Whether he occupied the position of treasurer or assistant I cannot say; at any rate, he was in the treasurer's office.

Q. 22. How soon did he become connected with the army?

A. I think he went out in the army at the first breaking out of the war.

Q. 23. Was he or not in the army at the time you received this deed and left it for record?

A. I really don't know, sir.

Q. 24. Where was Henry W. Kingsbury at that time?

A. I don't know whether he was in the West Point Academy or went into the army.

Q. 25. Did you ever have any correspondence with Henry W. Kingsbury?

A. I wrote him once, consulting about something or other, and I had an answer. That is the only time I ever had any correspondence with him.

Q. 26. When was that?

A. During 1861, I think.

Q. 27. Was it before or after that deed was left for record?

A. That I don't know.

Q. 28. Where was he when you wrote him?

352 A. He was in Washington city then.

Q. 29. Was he then in the army?

A. I think he was. He signed himself colonel of some regiment, I believe. No; he signed himself first lieutenant of the fourth artillery.

Q. 30. Did you have any correspondence with Mr. Buckner after the 17th of May, 1861?

A. No.

Q. 31. Or with his wife?

A. No.

Q. 32. Where was General Buckner and his family during the war?

A. Supposed to be in the Southern army; at various and sundry points, so far as I know. I never knew of my own knowledge where he was. He was at Fort Warren awhile.

Q. 33. Do you know whether his wife accompanied him?

A. I don't think she did, though I am not positive. She did during her residence in the South, but not all the time.

Q. 34. Was she at Louisville at any time during the war?

A. I don't know; I know nothing about her movements there.

Q. 35. Who attended to paying the interest upon the encumbrances upon this property?

A. During the management of General Burnside he attended to paying the interest; afterwards Mr. Latrobe paid the interest on the monies loaned. I paid all the taxes and ordinary bills and kept the premises in repair, etc.

353 Q. 36. Do you know whether Henry W. Kingsbury was associated in any way with General Burnside in 1861?

A. No.

Q. 37. Do you know whether Henry W. Kingsbury was at any time during 1861 and 1862 upon General Burnside's staff, in the army?

A. I have heard so; I know nothing of it of my own knowledge at all.

Q. 38. Did Mr. Latrobe come out to Chicago when he assumed the management and control of this property?

A. Yes.

Q. 39. How long did he retain such management?

A. I think he retained it as long as I did; I think we both went overboard at the same time.

Q. 40. Who succeeded him?

A. I believe J. Mason Parker.

Q. 41. Who employed J. Mason Parker?

A. That I don't know.

Q. 42. How long did Parker retain control of this property?

A. I don't know.

Q. 43. Do you know who succeeded him?

A. D. J. Lake.

Q. 44. By what authority was Lake put in the control of this property?

A. I understand by authority of county court.

Q. 45. Was he not appointed guardian by the county court
354 of the person of Henry W. Kingsbury?

A. Whether or not he was appointed guardian I don't know; he was appointed either guardian or agent or something of the sort by county court.

Q. 46. By whom were you selected in 1860 as agent of the property?

A. I suppose by General Buckner and Henry Kingsbury; they were both together.

Q. 47. Had you been acquainted with either of them before that time?

A. I had been acquainted with General Buckner.

Q. 48. How long?

A. About five years.

Q. 49. Where did you become acquainted with him?

A. Here in Chicago.

Q. 50. You never knew him down in Kentucky?

A. No, sir; he was in the army then.

Redirect examination by Mr. GOUDY:

Q. 1. You have stated that you understand that Mr. Latrobe was employed by the widow of Henry W. Kingsbury. Didn't you also understand that he was employed by Mrs. Jane C. Kingsbury?

A. Yes; I think I have seen the power of attorney from her and young Mrs. Kingsbury, both to him; I am not positive about it.

Q. 2. When you passed from the control of General Buckner to Mr. Latrobe was there any change made in your duties or the compensation?

355 A. There was a change made in the compensation.

Q. 3. What change?

A. I had been working for a stated salary before, and afterwards I got a percentage. It may not have been immediately at the change. I don't think it was. It was during Mr. Latrobe's administration.

Q. 4. What salary did you get?
A. I first got a thousand dollars a year.
Q. 5. Who fixed that?
A. General Burnside fixed that.
Q. 6. When was that amount determined upon?
A. I think it was in July or August, 1861.
Q. 7. Did you have any interview with General Burnside in regard to the management of this business while he was in the army?
A. Yes.
Q. 8. At some other place in Chicago?
A. Yes; twice.
Q. 9. Where?
A. I went once to New York city and once to Fortress Monroe.
Q. 10. At what time?
A. I went to New York city in July or August, 1861, and I went to Fortress Monroe in July, 1862.
Q. 11. Did you go of your own motion or at his request?
A. At his request.

Q. —. Do you know whether or not Henry W. Kingsbury
356 was at Fortress Monroe when you were there in July, 1862?

A. I didn't see. I am not positive whether he was there; his command was there.

By Mr. AYER:

Q. 13. What was his command?

By the WITNESS: It was a Connecticut regiment. He was under Burnside there at the time he was killed. Burnside had command of his regiment, or something of the sort, or he was on his staff.

By Mr. GOUDY:

Q. 14. He was in General Burnside's division?
A. Burnside's corps.
Q. 15. You stated that you destroyed the letter received in May, 1861, with the deed some two months ago.
A. Yes.
Q. 16. Did you read the letter at that time?
A. Yes.
Q. 17. Did any person suggest the destruction of that letter?
A. No.
Q. 18. Did you communicate the facts of its destruction to any person afterwards; if so, when, and to whom?
A. I have not communicated it to anybody unless I did to you. I believe you asked me about it once. I don't know whether I communicated it to you or not, but to nobody else.
Q. 19. Was there any design of any sort in destroying that letter to suppress it as evidence?
357 A. None in the world. I read it over and first thought it useless and destroyed it along with a great many others.

DAVID W. MITCHELL.

And I do further certify that JOHN G. SHORTALL, having been sworn, was examined in chief by Mr. GOUDY, and testified as follows:

Q. 1. What is your name, age, and residence?
A. John G. Shortall; thirty-two; Chicago.
Q. 2. What is your business or occupation?
A. Examining titles to real estate in this county.
Q. 3. What is the style of your firm?
A. Shortall & Hoard.
Q. 4. Have you indexes and facilities in your office for ascertaining the records of all the deeds in this county?
A. Yes.
Q. 5. Have you been requested to make an examination for the purpose of ascertaining whether or not any deed to Henry W. Kingsbury of property in this county has ever been made of record?
A. Yes.
Q. 6. Have you made such examination?
A. It has been made by the office.
Q. 7. When?
A. Within a week.
358 Q. 8. What deed or deeds, if any, did you find made to Henry W. Kingsbury?
A. We found one only, a deed from Simon B. Buckner and wife, and recorded in Book 212, page 624.
Q. 9. There is no other deed, within your knowledge, of record in this county to Henry W. Kingsbury?
A. None within my knowledge.
Q. 10. Your books show none others?
A. We made the examination from various sources of information, the principal one being the only one that can be used for that purpose—*i. e.*, the Grantee Index to Deeds, etc., in and belonging to the recorder's office of this county.

JOHN G. SHORTALL.

And I do further certify that the preceding deposition-, taken on application of parties as aforesaid in a suit now pending in the circuit court of Cook county, State of Illinois, particularly described in the caption to these depositions, was [were] reduced to writing by me and signed by the said David W. Mitchell and John G. Shortall in my presence, and that I am not of counsel or attorney for either of the parties to said suit, nor am I interested in the event thereof.

Witness my hand and seal this thirteenth day of December, A. D. 1870.

[SEAL.] S. W. BURNHAM,
Official Reporter of the Courts of Chicago.

My fee, $10, paid by Goudy & Chandler.

S. W. BURNHAM.

359 The following deposition of John Woodbridge, to wit:

Circuit Court of Cook County.

HENRY W. KINGSBURY, by His Next Friend, CORYDON BECKWITH,
vs.
AMBROSE E. BURNSIDE and Others. } Original Bill.

MARY K. BUCKNER and SIMON B. BUCKNER
vs.
HENRY W. KINGSBURY and Others. } Cross-Bill.

Depositions Taken by Agreement.

Present: Corydon Beckwith, for Henry W. Kingsbury, his next friend and guardian *ad litem;* Beckwith, Ayer & Kales, for Albert G. Lawrence and Eva Lawrence; Goudy and Chandler, for Simon B. Buckner, Mary K. Buckner, Ambrose E. Burnside, Jane C. Kingsbury, and John D. Kingsbury.

JOHN WOODBRIDGE, being duly sworn and examined in chief by GOUDY & CHANDLER on behalf of the parties represented by them, in answer to the following interrogatories testified as follows:

Q. What is your name, age, residence, and occupation?

A. My name is John Woodbridge; my age is 41: my occupation, attorney-at-law: residence, Chicago.

Q. Do you hold any official position by appointment of the
360 circuit court of Cook county; if so, what?

A. I am receiver of the estate of Henry W. Kingsbury by an appointment of that court in the cause of Jane C. Kingsbury against Eva Lawrence and others and the two cross-bills that are on file in the same cause.

Q. What property is in your charge as receiver? You need not give a particular description, but a general one.

A. Two original lots in the old town of Chicago, northeast corner of Randolph and Clark streets, fronting one hundred and sixty feet on Randolph and running back to the alley; also a tract of land on the North Branch of the Chicago river, extending from Kinzie street north to the centre of Ontario street, fronting west on the Chicago river and east in a line parallel to Market street and about two hundred and fifteen feet west of Market street.

Q. Ordinarily called the "Kingsbury tract?"

A. Ordinarily called the "Kingsbury tract."

Q. How long have you been such receiver?

A. I was appointed in April, 1869. I think I entered upon my duties about the 23d of that month. I received the first money on account of the estate on the 23d day of April, 1869.

Q. Are there any buildings on this property belonging to the estate; and, if so, what?

A. There is the building known as the Kingsbury block, on Ran-

dolph street, being numbers 111, 113, 115, and 117 Randolph. The building on the corner does not belong to the estate. There
361 is also a building on the North Side known as number 25 Kinzie street. There are several frame buildings on the tract of small value, on the tract on the North Side.

Q. From what source do the rents and profits come?

A. They come from the building I have named as the Kingsbury block, from a ground rent of the corner lot adjoining, and from the rent of the building 25 Kinzie street, and from ground rents of the remaining part of the tract on the North Side.

Q. What is the present annual amount of rents in the aggregate received from this property?

A. I think the leases call for about eighty-five thousand dollars a year. From that sum must be deducted something for bad debts. The precise amount I cannot now state.

Q. State as nearly as you can in round numbers the amount of current expenses for taxes, etc., per year.

A. I think the ordinary taxes would not be far from 16 thousand dollars a year; repairs, say 4 thousand; insurance, about 4 thousand; interest, about 12 thousand; expenses of managing property, including my commission, in the neighborhood of five thousand. There have been ever since I managed the estate, in addition, large amounts in special assessments for improving streets, etc.

Q. What disposition have you made of those rents and profits which you have been receiving?

362 A. I have first paid the expenses of renewing the estate, the cost of improving streets, the cost of repairs, etc., and I have divided the income, three-ninths or one-third to Mrs. Jane C. Kingsbury, two-ninths to Mrs. Eva Lawrence, the balance to Henry W. Kingsbury. I should say, in addition, paid some debts on account of those persons to various individuals, which came out of their respective shares. Perhaps I ought to explain that the sum of 85 thousand dollars included the store No. 113 Randolph street, which has been vacant now for several months, and that rental should be deducted.

Q. Making deductions for unoccupied property and bad debts, what would be the amount?

A. I should say 80 thousand dollars could be relied on, although I may be in error about it. Last year we did not lose a thousand dollars, I think, but this year we are going to lose more, or I fear so.

Cross-examination by BECKWITH, AYER & KALES:

Q. In the suit in which you are receiver is Henry W. Kingsbury one of the parties in this cause, a party also in that suit?

A. Yes, sir; I so understand.

Q. You have paid Henry W. Kingsbury or accounted with him since your receivership for four-ninths of the income of the Kingsbury property, have you not?

A. I have up to the date of the annual settlement in May last,

and am directed by the order of appointment to account to
363 him for that amount in future.

Q. And you are still under such orders from the circuit court, are you not?

A. Yes, sir.

JOHN WOODBRIDGE.

Subscribed and sworn to before me this 28th day of December, 1870.

NEWTON LULL,
Notary Public.

The foregoing deposition was taken by agreement of parties in the case entitled in the caption, before me, at the office of John Woodbridge, in Chicago, on the 28th day of December, 1870, the parties being represented as is stated in the caption, to be read in evidence on the hearing of said cause on the part of the complainants in said cross-bill and the defendants to said original bill, except Eva Lawrence and Albert G. Lawrence; and I further certify that the foregoing deposition was reduced to writing by me and signed by the said John Woodbridge in my presence and was duly sworn to by him before me, and that prior to his examination the said John Woodbridge was by me duly sworn to testify the truth and the whole truth in regard to the matters about which he should be interrogated.

Witness my hand and notarial seal this twenty-eighth day of December, 1870.

364 [SEAL.] NEWTON LULL,
Notary Public.

Notary's fees, $4.50, paid by Goudy & Chandler.

And the court, on objections being made to the competency of the evidence in each of the foregoing depositions contained, thereupon received them in evidence herein, subject to all legal objections going to the sufficiency, competency, and relevancy thereof under the pleadings in the said original and cross cause, no objections being made, however, to copies of papers produced and read in place of the original thereof.

JOHN G. ROGERS,
One of the Judges of the Cook County Circuit Court, Illinois.

I, Norman T. Gassette, clerk of the circuit court of Cook county, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect, and complete copy of all papers on file and all proceedings entered of record in a certain cause lately pending in said court on the chancery side thereof, wherein Henry W. Kingsbury is complainant and Ambrose E. Burnside *et al.* are defendants to the bill and Mary K. Buckner and Simon B. Buckner complainants and H. W. Kingsbury *et al.* defendants to the cross-bill.

365 In witness whereof I have hereunto set my hand and affixed the seal of said court, at Chicago, this 3d day of [SEAL.] January, A. D. 1871.

NORMAN T. GASETTE, *Clerk.*

Stamp, 5 cents (1.114), Jan. 3d, '71.
$100 for the record, paid by Goudy & Chandler.

STATE OF ILLINOIS:

Central Grand Division, Supreme Court. January Term, 1871.

MARY K. BUCKNER and SIMON B. BUCKNER
vs.
HENRY W. KINGSBURY, EVA LAWRENCE, Albert G. Lawrence, and Jane C. Kingsbury.
} Appeal from the Circuit Court of Cook County.

And now comes the said Mary K. Buckner and Simon B. Buckner, appellants, and say that manifest error hath intervened in the proceedings, of which the foregoing is a record, to their injury, and they assign the following errors, to wit:

1. The circuit court of Cook county erred in dismissing the cross-bill. The circuit court erred in dismissing the original bill without prejudice.

2. The circuit court of Cook county erred in refusing the
366 relief prayed in the cross-bill; and,

3. The proceedings are otherwise informal and erroneous.

Wherefore they pray the judgment of this court in the premises, and that the decree below, so far as it dismissed said cross-bill, be reversed and remanded, with specific instructions to the court below to enter a decree granting the relief asked in said cross-bill, or that a final decree be rendered in this court, etc.

GOUDY & CHANDLER,
Attorneys for Appellants.

R. W. WOOLEY, *Of Counsel.*

And then comes Henry W. Kingsbury, — his next friend, C. Beckwith, and assigns for error—

1st. The dismissal of the original bill.
2d. Refusing the relief prayed by the original bill.
3d. Admission of incompetent evidence in the original suit.

Wherefore we pray that the decree in original suit may be reversed and cause remanded.

C. BECKWITH, *Of Counsel.*

STATE OF ILLINOIS,
Supreme Court, Central Grand Division, } *ss:*

367 I, William A. Turney, clerk of said supreme court, hereby certify the foregoing to be a complete copy of the transcript

of a record filed in said supreme court on the 4th day of January, A. D. 1871, at the January term, A. D. 1871, of said supreme court, in the cases wherein Henry W. Kingsbury, by his next friend, Corydon Beckwith, was appellant and Ambrose E. Burnside *et als.* were appellees, and Mary J. Buckner and Simon B. Buckner were appellants and Henry W. Kingsbury *et als.* were appellees, as the same now appears from the said transcript now on file in my office.

[OFFICIAL SEAL.] In testimony whereof I have hereunto set my hand and affix- the seal of said court, at Springfield, the 31st day of October, A. D. 1871.

WM. A. TURNEY,
Clerk Supreme Court.

STATE OF ILLINOIS, } *ss:*
Cook County, }

I, Norman T. Gassette, clerk of the circuit court of Cook county, in the State of Illinois, hereby certify the above and foregoing to be a true and complete copy of the record of a certain cause pending in said court, wherein Henry W. Kingsbury was complainant and Ambrose E. Burnside *et al.* were defendants to the bill and
368 Mary K. Buckner and Simon B. Buckner complainants and H. W. Kingsbury *et al.* defendants to the cross-bill.

[OFFICIAL SEAL.] Witness my hand and the seal of said court this 17th day of June, A. D. 1872.

NORMAN T. GASSETTE, *Clerk.*

369 And thereupon, afterwards, to wit, on the 30th day of August, A. D. 1873, there was filed in said cause a certain affidavit for publication in words and figures following, to wit:

STATE OF ILLINOIS:

Circuit Court of Cook County.

HENRY W. KINGSBURY, by EVA LAWRENCE, Guardian and Next Friend, *ag'st* MARY K. BUCKNER and Others. } Chancery.

Harry Crawford upon his oath says that he is the solicitor for the complainant in the above-entitled action; that the defendants, Mary K. Buckner, Jane C. Kingsbury, Ambrose E. Burnside, and John J. D. Kingsbury, do not reside in the State of Illinois, but that Mary K. Buckner resides at Louisville, Kentucky, and Jane
370 C. Kingsbury resides — Old Lynn, Connecticut; said Ambrose E. Burnside resides at Providence, Rhode Island, and said John J. D. Kingsbury resides in Connecticut, but at what point this affiant is unable upon diligent enquiry to ascertain.

HENRY CRAWFORD.

Sworn to and subscribed before me this 30th day of August, 1873.

JACOB GROSS, *Clerk.*

And thereupon, afterwards, to wit, on the 17th day of September, A. D. 1873, there was filed in said cause a certain appearance in writing and certain proceedings had and entered by record, which said appearance and proceedings are in the words and figures following, to wit:

STATE OF ILLINOIS, } ss:
Cook County, }

Circuit Court. September Term, A. D. 1873.

HENRY W. KINGSBURY }
vs.
SIMON W. [B.] BUCKNER *et al.* }

We enter the appearance of Simon B. Buckner herein.
GOUDY & CHANDLER.

371 *Ord., Sept.* 17, 73.

HENRY W. KINGSBURY }
vs. } 8105, 1245. Bill.
SIMON B. BUCKNER *et al.* }

This day come Messrs. Goudy and Chandler and entered [enter] their appearance as solicitors for Simon B. Buckner, one of the defendants in the above-entitled cause.

And, on motion, it is ordered that the time in which to plead, answer, or demur to the complainant's bill of complaint in said cause be, and it hereby, is extended as to said defendant, Simon B. Buckner, to the first day of the next term.

And thereupon, afterwards, to wit, on the 18th day of September, A. D. 1873, there was filed in said cause a certain appearance in writing and a certain demurrer; which said appearance and demurrer are in the words and figures following, to wit:

Appr.

Circuit Court of Cook County.

HENRY W. KINGSBURY, by EVA LAWRENCE, His Guardian and Next Friend, }
vs. } In Chancery.
SIMON B. BUCKNER, JOHN J. D. KINGSBURY, MARY Buckner, Ambrose E. Burnside, Jane C. Kingsbury, & Corydon Beckwith. }

372 And now comes Corydon Beckwith, one of the defendants in the above-entitled suit, and enters his appearance therein. September 18th, 1873.

C. BECKWITH.

Dem'r.

Circuit Court of Cook County.

HENRY W. KINGSBURY, by EVA LAWRENCE, His Guardian & Next Friend,
vs.
SIMON B. BUCKNER, MARY BUCKNER, JANE C. KINGSBURY, John D. Kingsbury, Ambrose E. Burnside, and Corydon Beckwith. } In Chancery.

And the said Corydon Beckwith, one of the defendants, by protestation, not confessing all or any of the matters and things in the said complainant's bill contained to be true in such manner and form as the same are therein set forth and alleged, does demur to to the said bill, and for cause of demurrer shows that the said complainant has not by his said bill made such a case as entitles him in a court of equity to any discovery from this defendant or any relief against him as to the matters contained in the said bill or
373 any of such matters, and that any discovery which can be made by this defendant touching the matters complained of in the said bill or any of them cannot be of any avail to the said complain-t for any of the purposes for which a discovery is sought against this defendant by the said bill, nor entitle the said *complaint* complainant to any relief in this court touching any of the matters therein complained of.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, this defendant doth demur thereto, and he prays the judgment of this honorable court whether he shall be compelled to make any further or other answer to the said bill, and he humbly prays to be dismissed from hence with his reasonable costs in this behalf sustained.

C. BECKWITH, *Pro Se.*

And thereupon afterwards, to wit, on the 16th day of October, A. D. 1873, there was filed in said cause a certain demurrer in words and figures following, to wit:

Dem'r.

STATE OF ILLINOIS, } *ss.:*
Cook County, }

Circuit Court of Cook County.

374 HENRY W. KINGSBURY, by His Guardian and Next Friend, EVA LAWRENCE,
vs.
SIMON B. BUCKNER *et al.* } In Chancery.

The joint and several demurrer of Simon B. Buckner, Mary K. Buckner, and Jane C. Kingsbury, defendants, to the bill of complaint of Henry W. Kingsbury, an infant complainant, by his guardian and next friend, Eva Lawrence.

These defendants respectively by protestation, not confessing or

acknowledging all or any of the matters and things in the said complainant's bill to be true in manner and form as the same are therein set forth and alleged, do demur thereto and for cause of demurrer show that the said complainant hath not in and by his said bill made or stated such a case as doth or ought to entitle him to any such relief as is thereby sought and prayed for from or against these defendants or any of them.

Wherefore these defendants respectively demand the judg-
375 ment of this honorable court whether they shall be compelled to make any further or other answer to the said bill or any of the matters and things therein contained, and pray to be hence dismissed with their reasonable costs in this behalf sustained.

GOUDY & CHANDLER,
Sol'r- for said Defendants.

And thereupon, afterwards, to wit, on the 16th day of April, A. D. 1877, the following among other proceedings were had and entered in said cause, to wit:

Ord., Ap'l 16, '77.

HENRY W. KINGSBURY, an Infant, by EVA LAWRENCE, His Guardian & Next Friend, *vs.* SIMON B. BUCKNER and MARY K. BUCKNER, His Wife, Jane C. Kingsbury, John J. D. Kingsbury, Ambrose E. Burnside, and Corydon Beckwith.	8105, 122.	Bill.

This cause having this day been reached upon the call of the docket and no one appearing on behalf of either of said
376 parties, it is ordered by the court that said cause be, and it hereby is, dismissed out of this court at complainant's costs for want of prosecution.

Wherefore it is ordered and considered that said defendant- have and recover of said complainant their costs in this behalf expended, to be taxed, and that execution issue therefor.

And thereupon, afterwards, to wit, on the 17th day of May, A. D. 1877, there was filed in said cause a certain motion and affidavit; which said motion and affidavit are in the words and figures following, to wit:

Motion.

STATE OF ILLINOIS, } ss:
Cook County, }

Circuit Court of Cook County. April Term, A. D. 1877.

HENRY W. KINGSBURY, by Guardian and Next Friend,
v.
SIMON B. BUCKNER, MARK K. BUCKNER, JANE C. Kingsbury, JOHN J. D. Kingsbury, AMBROSE E. Burnside, & Corydon Beckwith. } In Chancery.

377 And now comes the above-named complainant, by Henry Crawford, his solicitor, and moves the court to set aside the order of dismissal heretofore entered in the above-entitled cause.

May 15, 1877.

H. CRAWFORD, *Solicitor.*

STATE OF ILLINOIS, } ss:
Cook County, }

Circuit Court of Cook County.

HENRY W. KINGSBURY, by Guardian or Next Friend,
vs.
SIMON B. BUCKNER *et al.*

Henry Crawford, being duly sworn, on oath states that he is the solicitor of the complainant in the above-entitled cause; that as such solicitor he drew the bill in said cause and knows the facts therein stated; that he believes the allegations in said bill contained to be true, and that they can be substantiated by proof; that said suit is instituted on behalf of the complainant, an infant, for the purpose of recovering a large and valuable property situated in Cook county; that said suit has been the subject of frequent negotiations
378 between the parties ever since its institution in efforts to arrange, adjust, and compromise the same outside of court, and on that account has not been pressed to a final hearing as soon as otherwise it might have been. Said affiant further says that he has been absent from the city a good deal of the time lately; that he was so absent when said suit was recently dismissed and has been so absent almost continuously ever since until the last few days; that he did not know of such dismissal until within the past few days, and that he took the earliest opportunity that he had after the fact of such dismissal came to his notice to appear in court and move to have said cause reinstated; that if said suit is not reinstated the estate of said complainant will be subjected to large expense in being obliged to commence another suit, and justice thereby greatly delayed. Said affiant further says that in his opinion as a lawyer and upon his knowledge of the facts and proofs pertaining to said cause he believes

that the said complainant has a just and meritorious cause of action, and that the complainant can recover therein.

H. CRAWFORD.

[SEAL.] Subscribed & sworn to before me this 16th day of May, 1877.

ROSWELL B. BACON,
Notary Public.

379 And thereupon, afterwards, to wit, on the same day, to wit, the 17th day of May, A. D. 1877, certain proceedings were had and entered of record and a certain plea and answer filed in said cause; which said proceedings, plea, & answer are in the words and figures following, to wit:

Ord., 17 *May*, '77.

HENRY W. KINGSBURY, an Infant, by EVA LAWRENCE, His Guardian and Next Friend, *vs.* SIMON B. BUCKNER *et al.* } 8105, 122. Bill.

On motion of Henry Crawford, Esq., solicitor for the complainant, and affidavit filed, it is ordered that the order of dismissal heretofore entered herein be, and the same hereby is, set aside and said cause reinstated on the docket of this court.

HENRY W. KINGSBURY, an Infant, by EVA LAWRENCE, His Guardian and Next Friend, *vs.* SIMON B. BUCKNER *et al.* } 8105, 122. Bill.

380 On motion of the solicitor for the defendant- it is ordered that leave be, and it hereby is, granted the defendants to withdraw their demurrer filed herein and to file a plea and answer *instanter.*

Plea.

STATE OF ILLINOIS, *Cook County.*

Circuit Court of Cook County. In Chancery.

HENRY W. KINGSBURY, by His Guardian and Next Friend, EVA LAWRENCE, *vs.* SIMON B. BUCKNER *et al.*

The plea of Simon B. Buckner and Ambrose E. Burnside, two of the defendants, to the bill of complaint of Henry W. Kingsbury, complainant.

These defendants, by protestation, not confessing or acknowledging all or any of the matters and things in said complainant's bill

of complaint mentioned and contained to be true and in such sort, manner, and form as the same is therein set forth and alleged, for plea to the said bill, say that on the nineteenth day of July, A. D. 1870, the said complainant, by his then next friend, exhibited
381 and filed in this court his certain bill of complaint in chancery against these defendants and the said Mary K. Buckner, Jane C. Kingsbury, John J. D. Kingsbury, Eva Lawrence, and Albert G. Lawrence, wherein the said complainant set forth & claimed that he was the owner of and seized in fee by an estate of inheritance of the whole of the real estate and premises in said bill described as the sole heir-at-law of his deceased father, Henry W. Kingsbury, and that his said father died seized in fee thereof, and that he had acquired title to an undivided half thereof by and through a deed executed by this defendant, Simon B. Buckner, and said defendant, Mary K. Buckner, bearing date the fifteenth day of May, A. D. 1861, in and by which they conveyed an undivided half of said lots five (5) and six (6), in block thirty-five (35), in the original town of Chicago, and all their right, title, and interest in and to the other tract of land in said bill described, commonly called the "Kingsbury tract," and situated in the northwest quarter (¼) of section nine (9), in township thirty-nine (39) north, of range fourteen (14) east, of the third (3rd) principal meridian.

The said complainant further averred in his said bill that said defendants, Mary K. Buckner, Jane C. Kingsbury, John J. D.
382 Kingsbury, and Eva Lawrence, claimed some interest in said estate, and prayed, among other things, that his right and title by inheritance to said estate as the son and heir of his said father, Henry W. Kingsbury, deceased, might be confirmed and established; and that on the thirty-first day of October, A. D. 1870, the said defendant, Mary K. Buckner, and this defendant, Simon B. Buckner, filed their joint and several answer to said bill, in which they denied that the said complainant was the owner of the whole of said real estate; but, on the contrary, they averred that the said Mary K. Buckner was the equitable owner of an undivided half thereof, and that the said deed executed by said Mary K. Buckner and Simon B. Buckner to the father of said complainant, dated the fifteenth day of May, A. D. 1861, was a conveyance in trust, not intended to vest any beneficial interest in the said Henry W. Kingsbury, but only to vest the legal title in him in trust; that on the said thirty-first day of October, A. D. 1870, the said Mary K. Buckner and this defendant, Simon B. Buckner, filed in said cause their certain cross-bill against the said Henry W. Kingsbury, Eva Lawrence,
383 Albert G. Lawrence, and Jane C. Kingsbury, wherein they set forth the pleadings in said cause so far as they had proceeded, and averred that on the said fifteenth day of May, A. D. 1861, they executed the said deed to the father of complainant without the knowledge of said grantee, and sent it to his agent in Chicago to be recorded, and that the said grantee remained ignorant of the said deed for several weeks; that it was made without any consideration, contract, arrangement, bargain, or promise whatever, and that the sole purpose of said Mary K. and Simon B. Buckner in executing the

said deed was to vest the title to said property in trust, and that they had no purpose whatever to make a gift of said property or any part thereof to Henry W. Kingsbury or to grant the same to him, except as a naked trustee, without any beneficial interest, and they claimed that by the rules of equity a trust created by implication of law or a resulting trust arose for their use and benefit to the extent and according to their respective interests and title when such deed was made; and they further aver that the said Henry W. Kingsbury in his lifetime declared such trust by his will, which is set forth in the bill of complaint in this cause, and also in a certain letter written by him on the twenty-third day of
384 & 385 October, A. D. 1861, to his mother, said Jane C. Kingsbury, and in a conversation in said letter referred, and they prayed that said deed be declared a deed of trust to the said Henry W. Kingsbury, deceased, for the use and benefit of the grantors or one of them, and that the said Henry W. Kingsbury, complainant in this cause, be held and declared to hold the property described in said deed as a trustee in like manner, and that he be required by the decree of court to reconvey said property to them or one of them; that an account be taken of the receipts & disbursements from and about said property, and such decree entered as equity might require in regard to such receipts and disbursements; that the said Jane C. Kingsbury might have her right of dower ascertained and set off; that the said Eva Lawrence might have her right of dower fixed and assigned; that partition might be made of said real estate; that the possession of the property owned by them be restored to them as they might severally be entitled thereto, and for such other relief as might be equitable.

And they further say that on the twenty-fifth day of Novem-
386 ber, A. D. 1870, an order was entered in said cause appointing Corydon Beckwith guardian *ad litem* of said Henry W. Kingsbury, and requiring him to answer said cross-bill within ten days, and that on the second day of December, A. D. 1870, the said Henry W. Kingsbury, by his said guardian *ad litem*, filed his answer to said cross-bill, in which he denied that the said premises were conveyed to the said Henry W. Kingsbury, deceased, upon any legal or valid trust, in manner and form as in the said cross-bill alleged, and he set up the statute of frauds and perjuries in chapter 44 of the Revised Statutes of 1845 as a defence to the cross-bill, and alleged that the said alleged trusts were not resulting trusts nor a trust created by construction, implication, or operation of law, and that the same were not nor had they been manifested, nor could they be proved by some or any writing signed by said Henry W. Kingsbury, deceased, nor by his last will in writing.

And they further say that the said Eva Lawrence and Albert G. Lawrence also filed their answer to said cross-bill on the second day of December, A. D. 1870, in which they denied the said alleged trust and set up the said statute of frauds and perjuries as a
387 defence to said cross-bill.

And they further say that general replications were filed by said cross-complainants to said answers.

And they further say that on the thirty-first day of December, A. D. 1870, the said cause came on to a hearing on the pleadings & evidence, and a decree was thereupon rendered by said court as of the twenty-fourth day of the same month, by which both the said original and cross bills were dismissed without prejudice, and that thereupon the said Henry W. Kingsbury, by his said next friend, prayed an appeal to the supreme court of Illinois, which was allowed, and that the said cross-complainants also prayed an appeal to said supreme court, which was allowed; that by agreement of parties such appeals were prosecuted to the January term, 1871, of the central grand division of said supreme court.

And they further say that in the appeal by said cross-complainants, Mary K. Buckner and Simon B. Buckner, the appellants assigned for error that—

1st. The circuit court erred in dismissing the cross-bill.

2nd. The circuit court erred in refusing relief as prayed by the cross-bill.

388 3rd. The circuit court erred in dismissing the original bill without prejudice; and,

4th. The proceedings are otherwise informal and erroneous.

And the appeal by the said Henry W. Kingsbury, the appellant, assigned for error that—

1st. The circuit court erred in dismissing the original bill.

2nd. The circuit court erred in refusing relief asked by the original bill; and,

3rd. The circuit court erred in dismissing the cross-bill without prejudice.

And they further say that such proceedings were had in said causes in said supreme court that on the fifth day of October, A. D. 1871, the said decree of the circuit court was reversed and said causes remanded to said circuit court with directions to that court to dismiss the original bill absolutely & to grant the relief prayed in the X bill by a decree establishing the equitable title in said Mary K. Buckner to her proper share in all said real estate, and declaring the said trust and requiring the proper conveyance of the legal title to her divested of any life estate in her hus-

389 band, said Simon B. Buckner (he having removed the same), and of right of dower in Eva Lawrence; that an account be taken between said Mary K. Buckner and all other parties interested in the estate of Julius J. B. Kingsbury, deceased, according to the rules and practice of the court of chancery in such cases, and that it be decreed accordingly; and the said supreme court, on said fifth day of October, A. D. 1871, filed its opinion in said causes, wherein it decided that the said deed of the fifteenth day of May, A. D. 1861, executed by said Mary K. and Simon B. Buckner to said Henry W. Kingsbury, deceased, was a conveyance of said property in trust for the benefit of said Mary K. Buckner, and that such trust was sufficiently manifested and proved by writing signed by said Henry W. Kingsbury, the party who was by law enabled to declare it, and that it must be executed.

And they further say that on the thirty-first day of October, A. D.

1871, the said cause was redocketed in the said circuit court upon the mandate of the supreme court being filed, and on the thirteenth day of November, A. D. 1871, the said circuit court, upon the pleadings and evidence and in pursuance of the mandate and di-
390 rections of the supreme court, entered a decree in said cause dismissing the original bill for want of equity, and finding and adjudging that the said deed, dated the fifteenth day of May, A. D. 1861, executed by the said Mary K. and Simon B. Buckner was a deed of trust conveying the premises to the grantees for the use and benefit of the grantors, to be reconveyed upon request; that said Simon B. Buckner was the equitable owner of a life estate in the premises described in said deed, and that said Mary K. Buckner was the equitable owner thereof in fee, subject to said life estate, and that both of said estates were subject to the dower right of James [Jane] C. Kingsbury, and that the said complainant, Henry W. Kingsbury, held the legal title as a trustee for the complainants in the cross-bill according to their respective estates therein, and that the said Simon B. Buckner had offered to waive his life estate, and it was ordered, adjudged, and decreed that a master in chancery make and deliver a deed conveying in behalf of said complainant, Henry W. Kingsbury, the said real estate in said deed described to said Mary K. Buckner, her heirs and assigns, divested of any life estate in said Simon B. Buckner, and of all right of dower
391 in said Eva Lawrence; and said decree further adjudged that the said Henry W. Kingsbury, complainant, was the owner in fee simple, subject to the right of dower of Jane C. Kingsbury and Eva Lawrence, of an undivided half of all the real estate in said complainant's bill described, and that the said Mary K. Buckner was the equitable owner of the estate in fee, subject to the right of dower of said Jane C. Kingsbury, of the other undivided half of said property, and that upon the execution and delivery of the deed by the master ordered by said decree she would become the legal owner thereof, and said decree therefore ordered and decreed that partition be made of said premises, and appointed commissioners to make partition of said premises between the said Henry W. Kingsbury and Mary K. Buckner, taking into consideration the quantity, quality, and value of the premises and the encumbrances thereon, giving to each of them one-half of said real estate, subject to the dower right, aforesaid.

And they further say that on the twenty-second day of January, A. D. 1872, the said commissioners filed their report, in which
392 they reported that they had allotted and assigned to the said Henry W. Kingsbury certain parts and portions of said real estate therein particularly described, and to the said Mary K. Buckner certain other parts and portions thereof, and they reported that at the request of the guardian of said Henry W. Kingsbury they had divided a certain portion of said real estate called the "Spencer tract" into two parts of equal value and assigned one part to each party, and also that they had allotted and assigned the several encumbrances upon said property to be assumed and paid by the said

Henry W. Kingsbury and Mary K. Buckner severally, as therein provided.

And they further say that on the twenty-third day of January, A. D. 1872, the master in chancery of said court reported that in pursuance of the said decree of November thirteenth, A. D. 1871, he had, on the fourteenth day of November, A. D. 1871, executed and delivered to the said Mary K. Buckner a deed conveying to her an undivided half of said property, as directed by said decree.

393 And they further say that on the twenty-fifth day of January, A. D. 1872, the said Henry W. Kingsbury, by his guardian, filed his exceptions to a part of the report of said master in chancery and to the report of said commissioners, and asked to have such part of the report and partition set aside; that said exceptions stated that the court had no jurisdiction to decree partition or to approve said conveyance, and said commissioners had no authority to embrace within their report any of the property embraced in a certain trust deed to Thomas Swann, which was the property above referred to as the Spencer tract.

And they further say that on the twenty-ninth day of January, A. D. 1872, a decree was rendered in said cause by said court by which the said deed and report by the master in chancery was ratified, approved, & confirmed except in regard to said "Spencer tract," and as to that the question was reserved, and by which the said report of said commissioners and said partition were ratified, approved, and confirmed except as to said "Spencer tract," as to which the

394 question was reserved, and said decree invested the said Henry W. Kingsbury with the title in fee simple to the property so allotted and assigned to him, except that part of said "Spencer tract" so allotted to him subject to the rights of dower of the said Jane C. Kingsbury and Eva Lawrence, and invested the said Mary K. Buckner and her assigns with the title in fee simple, subject to the right of dower of the said Jane C. Kingsbury, to the property so allotted and assigned to her except that part of said "Spencer tract" so allotted to her, and the said decree also allotted and assigned the encumbrances upon said property to be assumed and paid by the said Henry W. Kingsbury and Mary K. Buckner severally, as provided in said commissioners' report.

And they further say that on the twenty-ninth day of January, A. D. 1872, a writ of assistance for possession was issued by the clerk of said court to the sheriff, as directed by said decree, which was executed on the thirty-first day of January, A. D. 1872, by taking possession of the real estate so allotted and assigned to said Mary K. Buckner and delivering the same to her.

395 They further say that on the eighteenth day of March, A. D. 1872, said Mary K. Buckner entered a motion in said cause for an order giving leave to John Woodbridge, receiver, to pay to Mrs. Buckner one-half of all moneys collected or that might be collected from insurance policies as the same appeared by the report of said receiver filed in said cause; which motion was, on the twenty-sixth day of March, A. D. 1872, sustained, and from the order sus-

taining said motion the said Henry W. Kingsbury, by his guardian, prayed an appeal to the supreme court, which was allowed.

That on the second day of August, A. D. 1872, the said court overruled the said exception to the said master's and commissioners' reports and entered a decree confirming those parts of said reports to which exceptions had been taken and declaring the parties vested with the title to the land respectively set off and allotted to them, and from this decree an appeal was prayed to said supreme court by said Henry W. Kingsbury, by his guardian *ad litem*, which was allowed.

And they further say that on the eleventh day of Septem-
396 ber, A. D. 1872, the said Henry W. Kingsbury, appellant, filed in said supreme court a transcript of the record of said circuit court in said cause, and thereupon made an assignment of errors therein as follows, to wit:

And now comes the above-named Henry W. Kingsbury, by Anson Sperry, his guardian *ad litem*, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

1. The court erred in rendering the decree of November 13, 1871.

2. That the said decree of November 13, 1871, was rendered without proof against the said infant, Henry W. Kingsbury, and is contrary to law.

3. That the said decree of November 13, 1871, is not in accordance with the mandate of the supreme court, and was rendered without jurisdiction in the said Cook circuit court.

4. That the court below erred in finding that there were incumbrances upon the property described in the said decree with-
397 out having the incumbrances before the court, and without any evidence as to the existence, nature, validity, extent, or amount of such incumbrances or any of them.

5. That the said decree of Nov. 13, 1871, ordering a partition, is wholly indefinite and void in this, that it orders the said commissioners in partition to take into consideration the encumbrances on the said premises without any adjudication as to the amount, extent, validity, or nature of such encumbrances or any of them.

6. The court erred in decreeing any partition of said property without decreeing as to the said incumbrances and specifically decreeing their nature, validity, extent, and amount.

7. The court below erred in making said decree without disposing of the interest of said doweresses, Jane C. Kingsbury and Eva Lawrence.

8. The court below erred in receiving or acting upon the
398 pretended report of the commissioners in partition at the January term, 1872.

9. The land divided by the commissioners is not the same premises described in the decree, and the *and the* said commissioners had no warrant or authority to divide the same, nor was the same embraced within their oath.

10. The said commissioners had no authority under the law or said decree of partition to determine the existence, validity, extent,

or amount of the encumbrances mentioned in their said report, or any of them.

11. The said commissioners had no authority under law or said decree to apportion said incumbrances specified in their report, or any of them.

12. The said commissioners had no authority under law or said decree to find or report that interest had or had not been paid on the said encumbrances or any of them, or from what source the said interest had been paid.

13. The said report of said commissioners is indefinite and void as to the subject of encumbrances and interest.

399 14. That the court erred in confirming said report of commissioners in partition.

15. The court erred in rendering any decree of confirmation without preserving in the record the evidence upon which such decree was based.

16. The court erred in overruling the exceptions filed to the said report of commissioners.

17. The court erred in making any decree of partition or allotment of the encumbrances specified in such decree when the cross-bill of the said Mary K. & Simon B. Buckner had no allegation concerning such encumbrances and had no prayer for the allotment of such encumbrances.

18. The court erred in rendering any decree as to the said insurance moneys as set forth in the latter clause of said decree of Jan., 1872.

19. The court erred in ordering a receiver appointed in another cause to make any report in this cause.

20. The court erred in decreeing that the receiver in another
400 cause should pay over money to Mary K. Buckner.

21. The court erred in decreeing payment of the insurance money in the hands of said receiver without reference to the payment by him made.

22. The court erred in decreeing costs against the said infant, Henry W. Kingsbury.

For which errors the said Henry W. Kingsbury, by Anson Sperry, his guardian *ad litem*, prays that the said decree may be in all things reversed and the cause remanded.

And they further say that upon the hearing of said cause in said supreme court the said Henry W. Kingsbury, by his guardian *ad litem*, made the following points or objections to the said decree of the circuit court:

I. The court had no jurisdiction over the infant to render the decree of Nov. 13, 1871, on the so-called cross-bill.

II. The decree of November 13 was rendered without sufficient proof against the infant.

401 III. The decree of Nov. 13, 1871, was collusively obtained against the infant and is manifestly unjust.

And he specified as evidence of fraud and collusion on the part of Corydon Beckwith, former solicitor and guardian *ad litem* of said Henry W. Kingsbury, in and about the proceedings whereby

the said decree of November 13, 1871, —, and asked the court to consider—

"That the guardian *ad litem* agreed to an illegal notice to take Buckner's testimony.

He made no objection to the deposition when returned under a void commission.

He made no objection to the incompetency of Buckner to establish a trust for himself and wife by his own oath.

He made no objection for the infant to a single interrogatory propounded to Buckner.

He accepted an illegal notice to take Barrett's testimony and made no objection to it when returned.

402 He made no objection to the general incompetency of the witnesses, Jane C. Kingsbury and Burnside, or specifically to any single interrogatory.

He consented to the taking the depositions of Woodbridge, Shortall, & Mitchell in a manner not authorized by law.

No process or publication was ever taken out on the bill of the infant. The litigation was conducted in all respects like an agreed case.

The guardian *ad litem* called no witnesses and cross-examined none.

He consented to an expedited, a final, hearing on the very day the issues on the original bill were closed by replication, when, under the law, the cause did not stand for hearing until the next term sitting the third Monday in January.

He consented to and expedited *pro forma* decrees in the court below, so that, in fact, there never was any *bona fide* hearing.

He permitted the cross-bill to be tampered with after issue joined upon it, and without the authority of the court, by importing into it new and important matter, thereby causing his ward's in-

403 terests to be tried by a false record.

Instead of requiring the cross-complainant to follow what the court has termed "the proper and convenient practice" and procure a reference to the master to take the evidence and report the facts, he habitually promoted the taking and use of *ex parte* depositions in distant States before unofficial commissioners, and with every opportunity to fabricate and distort testimony.

He consented, for some reason not of record, that a false date should be given of the final hearing and decree, instead of the true one.

Instead of requiring the infant's adversaries to appeal in the ordinary manner required by law, he consented his ward's case — into a court sitting in four days thereafter.

He filed no abstract of the record; allowed the cross-complainant to submit the cause upon an abstract which concealed from the court all knowledge of the divers irregularities committed in taking the depositions relied on.

He failed to bring the infant's whole defence to the notice of the court or to assign proper errors.

The cross-complainants profited by this collusion or gross
404 neglect on the part of the representative of the infant, and are now in the possession of the fruits of the victory over this matter by inactivity.

IV. The decree of November 13, 1871, is contrary to law.

VI. The decree of Nov. 13, 1871, is indefinite and erroneous as regards incumbrances.

VII. The report of the commissioners in partition was illegal, and the court had no authority to receive or act upon it.

VIII. The decree of the circuit court, receiving and acting upon the illegal report of the commissioners, was void.

IX. The court erred in directing a receiver in another cause to report in this cause and in ordering such receiver to pay out funds in his hands to Mrs. Buckner.

X. It was error for the court below to overrule the special exceptions & decree a partition of the property alluded to as the Spencer mortgage tract.

405 XI. It was error to decree costs against the defendant.

And they further say that on the twentieth day of January, A. D. 1873, the said Henry W. Kingsbury, entered a motion in said supreme court to set aside the said judgment of reversal rendered October second, A. D. 1871, to recall the mandate issued to the circuit court, and to dismiss the appeal wherein the said Mary K. Buckner was one of the appellants, and said motion was based upon the alleged ground that the appeal was docketed in said court upon a forged record; that the record was changed by important additions to the cross-bill after issue had been joined upon it, and also upon the alleged entire want of jurisdiction in said court, and upon alleged evidences of fraud appearing in the record and the affidavits filed with the motion.

And they further say that on or about the 24th day of May, 1873, the said supreme court overruled said motion and rendered its decision in said cause, whereby it decided that there was no error in said decree except that the circuit court erred in finding that
406 said Mary K. Buckner had any interest in the said so-called "Spencer tract," and in decreeing partition thereof, and for that reason the said supreme court revised the said last decree of the circuit court and remanded the said cause to said circuit court.

And they further say that afterwards the said Mary K. Buckner filed in said supreme court a petition for a rehearing in said cause, and a rehearing was granted, and on the 8th day of November, 1873, said supreme court delivered another opinion to render the former opinion more explicit and prevent misconception of its meaning, whereby the said court affirmed the several decrees and decretal orders antecedent to the decree of August 2nd, 1872, upon which error was assigned, and reversed said decree of August 2nd, 1872, concerning the said Mary K. Buckner claim in the said Spencer tract, and remanded the cause for further proceedings in conformity with the opinion of said court, as explained and modified by said last opinion.

And they further say that on the 7th day of March, A. D.

1877, the death of said Mary K. Buckner, was suggested
407 in said cause, and Lily Buckner, her daughter and heir-at-law, was substituted as a party complainant in said cross-bill in her place and stead; and that afterwards, on the same day, a decree was entered in said cause in and by which it was ordered that the exceptions filed on the 25th day of January, 1872, by the said Henry W. Kingsbury, by his guardian, to that part of the report of said commissioners appointed to make partition which allotted to Mary K. Buckner one-half of said tract of land called the "Spencer tract," and to the report of said John Woodbridge, master in chancery, filed January 23rd, 1872, so far as stated in said exceptions, be sustained, and that the said deed, executed by said Woodbridge, master in chancery, to said Mary K. Buckner, be annulled so far as it purports to convey one undivided half of said "Spencer tract," and in and by which the said Woodbridge as master in chancery was ordered to convey said "Spencer tract" to said Henry W. Kingsbury in fee, subject to encumbrances, and in and by which the matter of accounting between the parties was reserved.

And these defendants deny all the allegations of said bill
408 of complaint wherein the said complainant alleges and charges that the said Mary K. Buckner and Simon B. Buckner procured the said decree establishing said trust in favor of said Mary K. Buckner and decreeing partition of said real — by fraud, misrepresentation, or collusion with the said defendant, Beckwith; but on the contrary they aver that the litigation which resulted in said decree was by the said Mary K. Buckner & Simon B. Buckner conducted in good faith and without any collusion between them and the said Beckwith, and that the same was entirely hostile in its character, and that they never had any agreement or understanding about the same or the conduct thereof with the said Beckwith except such as appear in the record, and that the said litigation was fairly and honestly prosecuted for the purpose of legally and equitably determining the respective rights and interest of the parties in said real estate and premises.

All which several matters and things these defendants do aver and plead the said former bill, cross-bill, pleadings, proceedings, and decrees in said former cause in bar to the complainant's present bill of complaint and demand the judgment of the court whether they shall be put to make any further or other answer thereto, and
409 pray to be hence dismissed with their costs and charges in this behalf sustained.

SIMON B. BUCKNER,
AMBROSE E. BURNSIDE,
By their solicitors, GOUDY, CHANDLER & SKINNER.

410 *Ans., &c.*

STATE OF ILLINOIS, } ss:
Cook County, }

Circuit Court of Cook County.

HENRY W. KINGSBURY, by His Guardian & Next Friend,
vs.
SIMON B. BUCKNER, MARY K. BUCKNER, *et al.* } In Chancery.

The joint and several answers of Simon B. Buckner and Ambrose E. Burnside, two of the defendants, to a part of the bill of complaint of Henry W. Kingsbury, in support of the plea of these defendants.

These defendants, reserving to themselves all benefit and advantage of exception to the many errors and uncertainties of said bill of complaint, for answer thereto or to so much thereof as they are advised it is material or necessary for them to make answer unto, deny that said original bill in chancery in the name of said complainant against said Burnside and others, filed in the said circuit court of Cook county on the 19th day of July, 1870, was filed in pursuance of any kind of understanding or agreement had
411 between the said Beckwith and the said Buckners or either of them; but, on the contrary, they aver that there never was any understanding or agreement between the said Beckwith and the said Buckners or either of them in relation to the filing of the said bill, and that there was no understanding that the said Buckners should enter their appearance thereto; but, on the contrary, they aver that the said Buckners had no knowledge, information, or intimation that said bill would be filed, and first learned thereof after the same was filed.

And, further answering, these defendants deny that said Buckner and wife procured the decree mentioned in said bill against the complainant by fraud and misrepresentation, or by the use of false and fraudulent pleadings, as alleged in said bill, or by collusion with the said Beckwith, as alleged; but, on the contrary, they aver that the litigation which resulted in said decree was conducted in good faith and without collusion between the said Buckners and the said Beckwith, and that the same was entirely hostile in its character, and that they never had any agreement or understanding about the same or the conduct thereof, except such as appears in the record, and that the said litigation was fairly and honestly prosecuted
412 for the purpose of legally and equitably determining the respective rights and interests of the parties in said real estate and premises

And, further answering, these defendants deny all and singular the allegations of said bill wherein are averred fraud, misrepresentation, or collusion on the part of the said Mary K. Buckner, Simon B. Buckner, or said Beckwith.

And now, having fully answered the parts of said bill which charge

fraud, misrepresentation, and collusion, these defendants pray to be hence dismissed with their costs, &c.

SIMON B. BUCKNER,
AMBROSE E. BURNSIDE,
By their solicitors, GOUDY, CHANDLER & SKINNER.

413 And thereupon, afterwards, to wit, on the 23rd day of May, A. D. 1877, there was filed in said cause a certain petition and bond and certain proceedings had & entered of record; all of which are in the words and figures following, to wit:

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Circuit Court.

HENRY W. KINGSBURY, by His Guardian and Next Friend, EVA LAWRENCE,
vs.
SIMON B. BUCKNER, MARY K. BUCKNER, JAMES [Jane] C. Kingsbury, John J. D. Kingsbury, Ambrose E. Burnside, and Corydon Beckwith. } In Chancery.

To the honorable judges of said court:

Your petitioner, Henry W. Kingsbury, respectfully shows unto your honors that the matters in dispute in the above-entitled cause exceeds, exclusive of costs, the sum of five hundred dollars; that no trial of said cause has as yet been had and no trial thereof
414 could have been had at any term preceding the present one, and that the said suit involves a controversy which is between citizens of different States wholly, and which can be fully determined as between them.

Your petitioner shows that he is a citizen of the State of Rhode Island and was such citizen at the institution of this action; that Simon B. Buckner, defendant, is a citizen of the State of Kentucky and was such citizen at the institution of this action; that Jane C. Kingsbury and John J. D. Kingsbury, defendants, are citizens of Connecticut and were such citizens at the institution of this action, and Ambrose E. Burnside, defendant, is a citizen of Rhode Island and was such citizen at the commencement of this action, and that Corydon Beckwith is a citizen of the State of Illinois.

Your petitioner further shows unto your honors that the controversy involved in said suit is between himself as complainant and Simon B. Buckner as defendant, and that Jane C. Kingsbury, John J. D. Kingsbury, Ambrose E. Burnside, and Corydon Beckwith, the other defendants to said bill, are only nominal parties to and have no substantial interest in the controversy involved in said suit, and that no relief is prayed against them.

415 Your petitioner desires to have the said suit transferred to the United States circuit court for the northern district of Illinois; and, herewith tendering bond conditioned as required by law,

your petitioner prays that said cause may be transferred to the said United States circuit court for the northern district of Illinois.

HENRY W. KINGSBURY,
By his next friend, EVA LAWRENCE.

Bond.

Know all men by these presents that Henry W. Kingsbury, by Eva Lawrence, his next friend, and John V. Le Moyne are held and firmly bound unto Simon B. Buckner in the sum of one thousand dollars, of lawful money of the United States, to be paid to the said Simon B. Buckner, his heirs, executor, or assigns; for which payment, well and truly to be made, we hereby bind ourselves, our executors, administrators, or assigns, firmly by these presents.

Signed and sealed with our hands this 24th day of May, A. D. 1877.

The condition of the above obligation is such that whereas a suit has been heretofore instituted and is now pending, in behalf
416 of the said Henry W. Kingsbury, by his next friend, Eva Lawrence, against Simon B. Buckner, Mary K. Buckner, Jane C. Kingsbury, John J. D. Kingsbury, Ambrose E. Burnside, and Corydon Beckwith, in the circuit court of Cook county, Illinois; and whereas the said Henry W. Kingsbury, complainant therein, desires the removal of said cause so pending, on or before the trial thereof, from the said circuit court of Cook county, Illinois, into the circuit court of the United States for the northern district of Illinois, and has filed his petition in said State court praying for such removal of such cause:

Now, therefore, — the said Henry W. Kingsbury shall enter a copy of the record of said cause in the circuit court of the United States for the northern district of Illinois on or before the first day of its next ensuing session thereof, and shall pay all costs that may be awarded against him by the said circuit court of the United States aforesaid if said court shall hold that said cause was improperly and wrongfully removed into said court, then this obligation shall become null and void; otherwise to remain in full force and effect.

HENRY W. KINGSBURY,
By his next friend, EVA LAWRENCE. [SEAL.]
JOHN V. LE MOYNE. [SEAL.]

417 And thereupon, afterwards, to wit, on the 2nd day of June, A. D. 1877, a certain answer was filed in said cause in words and figures following, to wit:

STATE OF ILLINOIS, } ss:
County of Cook, }

Ans. to Pet'n.

Circuit Court of Cook County.

HENRY W. KINGSBURY, by EVA LAWRENCE, His Guardian and Next Friend,
vs.
SIMON B. BUCKNER *et al.* } In Chancery.

The answer of Simon B. Buckner and Ambrose E. Burnside to the petition of said complainant for the removal of said cause to the circuit court of the United States for the northern district of Illinois.

These defendants, for answer to said petition and by way of objection to the removal of said cause to said circuit court of the United States, say that the bill of complaint in said cause was filed on the 11th day of August, 1873, and that on the — day of October, A. D. 1873, the defendants to said bill filed their general demurrer thereto, by which they allege that the said complainant had
418 not by his said bill stated such a case as would entitle him to any relief in a court of equity, and thereby, according to the practice of the court, they raised an issue of law to be tried by the court.

And they further say that a term of the court has been held every month since said issue was made, commencing on the third Monday of each month, and that according to the practice of the court the said complainant had the right to and might have called up the said cause for the trial of said issue of law on giving to the solicitors of the defendants appearing therein one day's notice at any of said terms, and that thereafter no action was taken by said complainant for the trial of said issue, and no action whatever in said cause until on the 16th day of April, A. D. 1877, when the docket of said court was called in pursuance of a notice given by the court for the dismissal of all causes where the parties had not shown due diligence in prosecuting; and upon such call said cause was dismissed by said court, upon the motion of defendants, for want of prosecution, and that afterwards, on the 17th day of May, 1877, said cause was reinstated upon the docket of said court upon the application of said
419 complainant, based on the following affidavit, to wit:

"STATE OF ILLINOIS, } ss:
Cook County, }

Circuit Court of Cook County.

HENRY W. KINGSBURY, by Guardian and Next Friend,
vs.
SIMON B. BUCKNER *et al.*

Henry Crawford, being duly sworn, on oath states that he is the solicitor of the complainant in the above-entitled cause; that as such

solicitor he drew the bill in said cause and knows the facts therein stated; that he believes the allegations in said bill contained to be true, and that they can be substantiated by proof; that said suit is instituted on behalf of the complainant, an infant, for the purpose of recovering a large and valuable property situated in Cook county; that said suit has been the result of frequent negotiations between the parties ever since its institution in efforts to arrange, adjust, and compromise the same outside of court, and on that account has not been pressed to a final hearing as soon as otherwise it might have been. Said affiant further says that he has been absent from
420 the city a good deal of the time lately; that he was so absent when said suit was recently dismissed, and has been so absent almost continually ever since until the last few days; that he did not know of such dismissal until within the past few days, and that he took the earliest opportunity that he had after the fact of such dismissal came to his notice to appear in court and move to have said cause reinstated; that if said suit is not reinstated the estate of said complainant will be subjected to large expense in being obliged to commence another suit, and justice thereby greatly delayed. Said affiant further says that, in his opinion as a lawyer and upon his knowledge of the facts and proofs pertaining to said cause, he believes that the said complainant has a just and meretorious cause of action, and that the complainant can recover therein.

H. CRAWFORD.

Subscribed and sworn to before me this 16th day of May, 1877.

[SEAL.] ROSWELL BACON,
Notary Public."

421 And after it was so reinstated, on the 17th day of May, 1877, the demurrer of all of said defendants except Corydon Beckwith was withdrawn, and these defendants filed their certain plea to a part of said bill and their answer to the balance thereof; and on the 17th day of May, 1877, the solicitors of these defendants served notice upon the solicitors of said complainant of the filing of said plea and answer; and on the 24th day of May, 1877, the solicitors of these defendants served notice upon the solicitors of said complainant that on the 25th day of May, at 10 o'clock in the forenoon, they would ask the court to set said cause down for hearing, and that on the morning of said 25th day of May the said complainant filed his said petition and bond and said solicitors for these defendants moved the court to set said cause down for hearing, which motion was not considered by the court on account of the filing of said petition; and they say that the foregoing embraces all the action ever taken in said cause and all the orders ever entered therein, and they aver that since the passage of the act of Congress entitled "An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from
422 State courts, and for other purposes," approved March 3rd, 1875, many terms of said circuit court of Cook county have

been held, at which said causes could have been tried, prior to the term at which said petition was filed.

And they further say that prior to the time of filing said bill and on the 7th day of August, A. D. 1872, the said complainant, by his next friend, Evaline A. Taylor, filed his bill of complaint in the circuit court of the United States for the northern district of Illinois, in chancery, against said defendants, Simon B. Buckner, Mary K. Buckner, and Jane C. Kingsbury, which bill was in substance, in its allegations and prayer for relief, the same as the bill in this cause, and the same was, upon motion of defendants, dismissed on the 12th day of November, 1872, by said court for want of jurisdiction of the parties and subject-matter of the bill.

And they further say that on the third day of February, 1875, the said Eva Lawrence filed in the county court of Cook county (by which court she had about the first day of August, 1873, been
423 appointed guardian of the said Henry W. Kingsbury) her resignation as such guardian, and thereupon one Heman G. Powers was appointed by said court guardian of said Henry W. Kingsbury in her place and stead, and he is now such guardian, and the said Eva Lawrence is not now, nor was she at the time of filing such petition, the guardian of the said Henry W. Kingsbury, nor entitled, as such guardian, to file said petition or represent him in said cause; and they further say that the said complainant is still a minor and under the age of twenty-one years, and that the said Eva Lawrence has never been appointed or allowed to prosecute this suit or otherwise represent the said Henry W. Kingsbury as his next friend.

SIMON B. BUCKNER,
AMBROSE E. BURNSIDE,
By their solicitors, GOUDY & CHANDLER.

And thereupon, afterwards, to wit, on the 23rd day of June, A. D. 1877, the following, among other, proceedings were had and entered of record in said cause, to wit:

424 *Order of June 23, '77.*

HENRY W. KINGSBURY, an Infant, by EVA LAWRENCE, His Guardian and Next Friend, *vs.* SIMON B. BUCKNER, MARY K. BUCKNER, His Wife; Jane C. Kingsbury, John J. D. Kingsbury, Ambrose E. Burnside, and Corydon Beckwith.	8105, 122.	Bill.

This day came the said complainant, by Henry Crawford, Esq., his solicitor, and filed his petition for the transferring of said cause into the United States circuit court for the northern district of Illinois, and the said complainant offering as surety a bond in the penal sum of one thousand dollars, with John V. Le Moyne as surety, conditioned that said complainant will enter into said circuit court of the United States, on the first day of its next session, copies of the

process issued in said cause, and the court, being fully satisfied with the surety offered, doth order that said cause be, and it is hereby, transferred to said United States circuit court for the northern district of Illinois, according to the act of Congress in such case made and provided.

425 STATE OF ILLINOIS, } ss:
County of Cook, }

I, Jacob Gross, clerk of the circuit court of Cook county and the keeper of the records & files thereof, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect, and complete copy of all the papers filed and proceedings had and entered of record in a certain cause lately pending in said court, on the chancery side thereof, between Henry W. Kingsbury, by next friend, compl't, and Simon B. Buckner *et al.*, defendants.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Chicago, in said county, this 28th day of June, 1877.

[SEAL.] JACOB GROSS, *Clerk.*

(Endorsed:) Filed July 2, 1877. Wm. H. Bradley, clerk.

426 Afterwards, to wit, on the first day of December, in the adjourned October term of said court, 1877, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

HENRY W. KINGSBURY *et al.* } In Chancery.
vs.
SIMON B. BUCKNER *et al.* }

On motion of complainants' solicitor it is ordered by the court that this cause be set down for hearing upon the bill, answer, and pleadings herein.

Afterwards, to wit, on the twenty-seventh day of April, in the adjourned March term of said court, 1878, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

HENRY W. KINGSBURY *et al.* } In Chancery.
vs.
SIMON B. BUCKNER *et al.* }

On motion of W. C. Goudy, Esq., solicitor, it appearing to the court that John V. Le Moyne had been appointed by the pro-
427 bate court of Cook county guardian of the minor Henry W. Kingsbury, and that this cause affects the property of said

minor in said county of Cook, it is ordered that said John V. Le Moyne, guardian, &c., be made a party complainant herein in place of Eva Lawrence, and leave is given complainant to reply to the plea and answer herein, which replication is now filed, and, on motion of Mr. Goudy, solicitor, this cause is set down for hearing on pleadings herein.

428 Afterwards, to wit, on the first day of May, 1878, came John V. Le Moyne, guardian of Henry W. Kingsbury, a minor, and filed in said clerk's office his replication to the answer of Simon B. Buckner and Ambrose E. Burnside in said entitled cause; which said replication is in the words and figures following, to wit:

Replication.

UNITED STATES OF AMERICA, } ss:
Northern District of Ills., }

In the Circuit Court of the United States, Northern District of Illinois. April Term, A. D. 1878.

JOHN V. LE MOYNE, Guardian of Henry W. Kingsbury, Minor, v. SIMON B. BUCKNER *et al.* } In Chancery.

The replication of John V. Le Moyne, guardian of Henry W. Kingsbury, minor, complainant, to the answer of Simon B. Buckner and Ambrose E. Burnside, defendants.

This repliant, saving and reserving to himself now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer of the said defendants, for replication thereunto says that he will aver, maintain, and prove said bill of complaint to be true, certain, and sufficient in the law to be answered unto,
429 and that the said answer of the said defendants is uncertain, untrue, and insufficient to be replied unto by this repliant, without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by the said bill he has already prayed.

JOHN V. LE MOYNE, *Guardian.*

Endorsed: Filed this first day of May, A. D. 1878. W. H. Bradley, clerk.

430 On the same day, to wit, on the first day of May, 1878, came John V. Le Moyne, guardian of Henry W. Kingsbury, a minor,

and filed in said clerk's office his replication to the plea of Simon B. Buckner and Ambrose E. Burnside in said entitled cause; which said replication is in the words and figures following, to wit:

Replication.

UNITED STATES OF AMERICA, } ss:
Northern Dist. of Illinois, }

In the Circuit Court of the United States, Northern District of Illinois. April Term, A. D. 1878.

JOHN V. LE MOYNE, Guardian of Henry W. Kingsbury, Minor,
vs.
SIMON B. BUCKNER *et al.* } In Chancery.

The replication of John V. Le Moyne, guardian of Henry W. Kingsbury, minor, complainant, to the plea of Simon B. Buckner and Ambrose E. Burnside, defendant-.

This repliant, saving and reserving to himself now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said plea of the said defendants, for replication thereunto says that he will aver, maintain, and prove said bill of complaint to be true, certain, and sufficient in the law to be answered unto, and that the
431 said plea of the said defendants is uncertain, untrue, and insufficient to be replied unto by this repliant, without this, that any other matter or thing whatsoever in the said plea contained material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by the said bill he has already prayed.

JOHN V. LE MOYNE,
Guardian, Complainant.

Endorsed: Filed this first day of May, A. D. 1878. W. H. Bradley, clerk.

Afterwards, to wit, on the eight day of May, in the adjourned May term of said court, 1878, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

HENRY W. KINGSBURY, &c., *et al.*
vs.
SIMON B. BUCKNER *et al.* } In Chancery.

On motion of W. C. Goudy, Esq., solicitor, it is ordered that this

cause be referred to Henry W. Bishop, Esq., the master in chancery of this court, to take proofs herein and report the same to the court.

432 Afterwards, to wit, on the eighteenth day of May, 1878, came Henry W. Bishop, the master in chancery of said court, and filed in said clerk's office his report in said entitled cause; which said report is in the words and figures following, to wit:

Master's Report.

In the Circuit Court of the United States for the Northern District of Illinois. In Chancery.

HENRY W. KINGSBURY, by JOHN V. LE MOYNE, His Guardian, Complainant,
vs.
SIMON B. BUCKNER, MARY K. BUCKNER, His Wife; JANE C. KINGSBURY, JOHN J. D. KINGSBURY, and Others, Defendants.

To the honorable the judges of said court:

The above-entitled cause having been referred to me as master in chancery of said court, by an order of said court entered herein on the 8th day of May, A. D. 1878, to take proofs herein and report the same to the court; I do hereby report that I was attended, on the 14th day of May, A. D. 1878, by John V. Le Moyne,
433 Esquire, guardian and of counsel for complainant, and by W. C. Goudy, Esq're (of Goudy, Chandler & Skinner), of counsel for defendants. Said counsel for defendants offered in evidence the several documents mentioned and described in the memorandum of proceedings before the said master in chancery on said 14th day of May, A. D. 1878, which is hereto annexed.

The said counsel for defendants also testified herein, and his testimony was duly taken, is hereto annexed, and made a part hereof.

I return all the documents so produced in evidence before me and make the same a part hereof.

All of which is respectfully submitted.

HENRY W. BISHOP,
Master in Chancery of the Circuit Court of the United States for the Northern District of Illinois.

Dated Chicago, May 4th, 1878.

434 In the Circuit Court of the United States for the Northern District of Illinois.

HENRY W. KINGSBURY, by JOHN V. LE MOYNE, His Guardian, Complainant,
vs.
SIMON B. BUCKNER *et al.*, Defendants.

Proceedings before Henry W. Bishop, Master of said Court, May 14, 1878.

Present: John V. Le Moyne, Esq., guardian & solicitor for complainant, and W. C. Goudy, Esq., solicitor for defendant-.

Solicitor for defendant- offered in evidence a transcript of the record from the supreme court of Illinois, central grand division, in the case of Henry W. Kingsbury, by his next friend, Corydon Beckwith, *vs.* Ambrose E. Burnside *et al.*, original bill, and Mary K. Buckner *et al. vs.* Henry W. Kingsbury *et al.*, cross-bill, certified by the clerk of that court on the thirty-first day of October, 1871, of which a copy is hereto attached, marked "Exhibit A."

The solicitor for the defendants also offered in evidence an opinion of the supreme court, contained in volume 58, page 310, of Reports of Illinois Supreme Court.

435 The solicitor for the defendant- further offered in evidence a transcript from the supreme court of Illinois in an appeal of Henry W. Kingsbury *vs.* Mary K. Buckner, certified May 10, 1878, which is hereto attached as "Exhibit B."

Solicitor for defendants also offered in evidence a certified copy of the assignment in error in said cause, certified October 24, 1873, attached hereto as "Exhibit C."

Solicitor for defendants then offered in evidence opinion of the supreme court in said cause, as found in volume 70, Illinois Reports, page 514.

Solicitor for defendants further offered in evidence a copy of the arguments in said cause, made by Henry Crawford, as solicitor for the appellant, attached hereto as "Exhibit D."

Solicitor for defendant- offered a certified copy of the order of the circuit court of Cook county, made on the eighteenth day of June, A. D. 1873, reinstating said case, in pursuance of a mandate of the supreme court, attached hereto as "Exhibit E."

And also a copy of a certain order and final decree, entered in said cause on the seventh day of March, 1877, attached hereto as

436 "Exhibit F."

Defendants' solicitor also introduced a certified copy of a certain motion and the order thereon in the supreme court of Illinois, in the central grand division, at the January term, 1873, made in the case of Simon B. Buckner *et al.* against Henry W. Kingsbury, attached hereto as "Exhibit G."

In the Circuit Court of the United States for the Northern District of Illinois.

HENRY W. KINGSBURY, by JOHN V. LE MOYNE, Guardian, Complainant,
vs.
SIMON B. BUCKNER *et al.*, Defendants.

Testimony taken before Henry W. Bishop, master in chancery of said court.

TUESDAY, *the 14th day of May, A. D.* 1878.

Present: John V. Le Moyne, Esq., solicitor for complainant, and W. C. Goudy, Esq., solicitor for defendants.

W. C. GOUDY, a witness on behalf of the defendants, being
437 first duly sworn, was examined in chief by Mr. ——, and deposes and says as follows:

The brief and argument of Henry Crawford, as solicitor for appellant — Henry W. Kingsbury *vs.* Mary K. Buckner and others, at the September term, 1872, offered in evidence as "Exhibit D," was filed in the supreme court as the argument for appellant on the eighth day of October, 1872, and was considered by the court in the decision of said cause. These facts I have personal knowledge of, having been the attorney for the appellees.

W. C. GOUDY.

Mr. Le Moyne, solicitor for complainant, wished to reserve all exceptions that he might desire to take hereafter.

(Endorsed:) Filed May 18, 1878. Wm. H. Bradley, clerk.

438 Afterwards, to wit, on the twentieth day of May, in the adjourned May term of said court, 1878, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

HENRY W. KINGSBURY, &c., *et al.*
vs.
SIMON B. BUCKNER *et al.* } In Chancery.

Now come the defendants, by Goudy & Chandler, their solicitors, and comes also J. V. Le Moyne in person, and on motion of the defendants, by their solicitors, it is ordered that the order entered herein on the twenty-seventh day of April last be set aside and vacated and the following order be now entered as of said twenty-seventh day of April, to wit:

This cause coming on for a hearing under the order heretofore

entered, John V. Le Moyne, Esq., appearing as guardian of the complainant, Henry W. Kingsbury, and the defendants, by W. C. Goudy, Esq., and it appearing to the court that Eva Lawrence has resigned as guardian of the minor complainant, Henry W. Kingsbury, and that John V. Le Moyne has been appointed as her successor as guardian of the estate of the said Henry W. Kingsbury by the probate court of Cook county and now is acting as such guardian, and that this cause relates to property claimed by him, upon the
439 motion of the defendants, by their solicitor-, it is ordered that John V. Le Moyne, guardian of the estate of Henry W. Kingsbury, be substituted, for Eva Lawrence and be authorized to prosecute this suit as such in all respects as if he had been originally named in the bill.

And the said John V. Le Moyne, guardian as aforesaid, then asked leave to file a replication to the defendants' plea and a replication to the defendants' answer, which the court allowed, upon the condition that the hearing should not thereby be delayed.

It is further ordered that complainants close their proofs herein by the fifteenth day of June next, and that it shall be in order for either party to set the cause for hearing on pleadings and proofs at any time after said day for closing proofs.

Afterwards, to wit, on the second day of July, in the July term of said court, 1878, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

HENRY W. KINGSBURY *et al.*
vs.
SIMON B. BUCKNER *et al.*
} In Chancery.

Now come the parties, by their solicitors, and on motion of W. C. Goudy, Esq., solicitor, this cause is submitted to the court on
440 the pleadings and proofs herein, and the court, after hearing the same, not being sufficiently advised in the premises, takes the same under advisement.

Afterwards, to wit, on the nineteenth day of July, in the July term of said court, 1878, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Decree.

HENRY W. KINGSBURY, by His Guardian, JOHN V. LE MOYNE,
vs.
SIMON B. BUCKNER, AMBROSE E. BURNSIDE, CORYDON BECKWITH, and JANE C. KINGSBURY.
} In Chancery.

This cause coming on for a final hearing upon the pleadings and

proofs, and it being suggested that Mary K. Buckner has died since the commencement of this suit, it is ordered that the suit abate as to her, and it is further ordered, adjudged, and decreed that the demurrer of the defendant, Corydon Beckwith, and the demurrer of the defendant, Jane C. Kingsbury, to the bill be severally sustained.

And the court having found the issue for the defendants, Simon B. Buckner and Ambrose E. Burnside, on the plea filed by
441 them, and no replication having been filed to their answer, it is further ordered, adjudged, and decreed that the bill be dismissed for the want of equity, and that the guardian of the complainant, Henry W. Kingsbury, pay the costs from funds belonging to his ward.

442 Afterwards, to wit, on the twelfth day of December, 1885, came Henry W. Kingsbury, by his solicitors, and filed in said clerk's office his petition in said entitled cause; which said petition is in the words and figures following, to wit:

Petition.

UNITED STATES OF AMERICA, *Northern District of Illinois:*

In the Circuit Court. In Chancery.

HENRY W. KINGSBURY, by Guardian and Next Friend,
v.
SIMON B. BUCKNER, JANE C. KINGSBURY, JOHN J. C. KINGSBURY, AMBROSE E. BURNSIDE, & CORYDON BECKWITH.

To Messrs. Goudy & Chandler and Mr. Corydon Beckwith:

You are hereby notified that on Saturday, Dec. 12th, 1885, at the hour of 10 a. m., or as soon thereafter as counsel can be heard, we shall, before his honor Judge Gresham, in his court-room, ask for an order allowing an appeal from the final
443 decree heretofore entered in said cause upon the petition of said complainant, a copy of which is attached hereto; at which time and place you can be present, if you see fit.

Dated Dec. 10th, 1885.

WILSON & MOORE,
Att'ys for Petitioner.

Service of the above notice by true copy thereof accepted this 10th day of Dec., 1885.

C. BECKWITH.

STATE OF ILLINOIS, } ss:
Cook County, }

M. L. Roftree, being duly sworn, states that he served the above notice on Messrs. Goudy & Chandler by leaving a true copy thereof with the person in charge of their office on Dec. 10th, 1885.

M. L. ROFTREE.

Subscribed and sworn to before me this 10th day of Dec., 1885.
[SEAL.] CHARLES N. LANMAN,
Notary Public.

444 UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

In the Circuit Court. In Chancery.

HENRY W. KINGSBURY, by Guardian & Next Friend, }
vs. } Bill.
SIMON B. BUCKNER, JANE C. KINGSBURY, JOHN J. D. KINGSBURY, AMBROSE E. BURNSIDE, and CORYDON BECKWITH. }

To the honorable judges of said circuit court:

Your petitioner, Henry W. Kingsbury, respectfully shows to your honors that he is the complainant in the said cause; that the same was prosecuted to final decree in petitioner's name and behalf by his guardian and next friend; and petitioner shows that at the time said suit was begun he was an infant, and that at the time the final decree therein was rendered, to wit, July 19th, 1878, he was still a minor, and has only come of age within two years last past.

That petitioner was born on the 16th day of December,
445 1862; that the said cause was begun in the circuit court of Cook county, State of Illinois, at the July term, 1873, as petitioner is informed, and was afterwards removed, in due form of law, to this court; that petitioner was complainant therein and the other parties above named were defendants; that on July 19th, 1878, the final decree therein was entered and petitioner's bill dismissed for want of equity, from which said decree your petitioner now desires to perfect and prosecute an appeal to the Supreme Court of the United States, as he lawfully may under the provisions of the statutes of said United States for that purpose made and provided.

Petitioner therefore prays that his said appeal from the said decree in the above-mentioned cause may be allowed upon filing a good and sufficient appeal bond in such sum as the court may fix.

HENRY W. KINGSBURY.

STATE OF ILLINOIS, } ss:
Cook County, }

Henry W. Kingsbury, being duly sworn, on oath says that he is the complainant in the above-mentioned cause; that he has read the foregoing petition by him subscribed & knows the con-
446 tents thereof, and that the same is true except as to the matters therein stated on information & belief, and as to those matters he believes them to be true.

HENRY W. KINGSBURY.

Subscribed & sworn to before me this 10th day of December, A. D. 1885.
[SEAL.] M. L. RAFTREE,
Notary Public.

(Endorsed:) Filed Dec. 12, 1885. Wm. H. Bradley, clerk.

447 On the same day, to wit, on the twelfth day of December, in the adjourned October term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, — is in the words and figures following, to wit:

Order.

HENRY W. KINGSBURY
vs.
SIMON B. BUCKNER *et al.* } In Chancery.

Now comes the complainant, by J. P. Wilson, Esq., his solicitor, and prays an appeal to the Supreme Court of the United States from the decree entered herein on the nineteenth day of July, 1878, which is allowed on the filing by said complainant of a bond in the penal sum of one thousand dollars, with surety to be approved by the court.

448 Afterwards, to wit, on the sixteenth day of December, 1885, there was filed in said clerk's office an appeal bond in said entitled cause; which said appeal bond is in the words and figures following, to wit:

Appeal Bond.

UNITED STATES OF AMERICA,
Northern District of Illinois, } *ss:*

In the Circuit Court.

HENRY W. KINGSBURY
vs.
SIMON B. BUCKNER, JANE C. KINGSBURY, JOHN J. D. Kingsbury, Ambrose E. Burnside, and Corydon Beckwith. } In Chancery. Bill.

Know all men by these presents that we, Henry W. Kingsbury and John P. Wilson, as surety, of Cook county and State of Illinois, are held and firmly bound unto Simon B. Buckner, Jane C. Kingsbury, John J. D. Kingsbury, Ambrose E. Burnside, Corydon Beckwith, in the penal sum of one thousand dollars, lawful money of the United States; for the payment of which, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 12th day of December, A. D. 1885.

The condition of the above obligation is such that
449 & 450 whereas the above-named Henry W. Kingsbury hath taken an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled action on

July 19th, 1878, by the circuit court of the United States for the northern district of Illinois:

Therefore if the said Henry W. Kingsbury shall prosecute his said appeal with effect and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

HENRY W. KINGSBURY. [SEAL.]
JOHN P. WILSON. [SEAL.]

This bond is approved, but is not to act as a supersedeas.

H. W. BLODGETT, *Dist. Judge.*

Endorsed: Filed Dec. 16th, 1885. Wm. H. Bradley, cl'k.

451 EXHIBIT A.

STATE OF ILLINOIS, } *ss:*
Cook County, }

Circuit Court. In Chancery.

HENRY W. KINGSBURY, by His Next Friend, CORYDON BECKWITH, *vs.* AMBROSE E. BURNSIDE *et al.* } Bill.

MARY K. BUCKNER *et al.* *vs.* HENRY W. KINGSBURY *et al.* } Cross-Bill.

Messrs. Beckwith, Ayer & Kales, solicitors for complainant in original bill and defendants in said cross-bill.

GENTLEMEN: You are hereby notified that we shall, on Saturday, the 4th day of November, A. D. 1871, at the going in of said court in the forenoon, or as soon thereafter as counsel can be heard, apply to the said court for leave to file the annexed record in place of and as a substitute for the record and papers in said causes lately destroyed by fire.

November 3d, 1871.

GOUDY & CHANDLER,
Solicitors for Complainants in said Cross-Bill, &c.

452 We accept service of the within notice this 3d day of November, A. D. 1871.

BECKWITH, AYER & KALES.

To Corydon Beckwith, Esq., next friend and guardian *ad litem* of Henry W. Kingsbury, minor.

SIR: You are hereby notified that we shall, on Saturday, the 4th day of October, A. D. 1871, at the going in of said court in th-e fore noon, or as soon thereafter as counsel can be heard, apply to the cir-

cuit court of Cook county for leave to file the annexed record in place of and as a substitute for the record and papers in said causes lately destroyed by fire.

November 3d, 1871.

GOUDY & CHANDLER,
Solicitors for Complainants in Cross-Bill.

I hereby accept service of the foregoing notice this 3d day of November, A. D. 1871.

C. BECKWITH.

453 UNITED STATES OF AMERICA, }
State of Illinois, County of Cook, } *ss:*

Pleas before the honorable the judges of the Cook county judicial circuit of the State of Illinois, at a term of the circuit court of Cook county begun and held at the court-house, in the city of Chicago, in said county, on the third Monday (being the nineteenth day) of December, in the year of our Lord one thousand eight hundred and seventy, and of the Independence of the said United States the ninety-fifth.

Present: Honorable Erastus S. Williams, chief justice of the circuit court of Cook county, in the State of Illinois; W. W. Farwell, Henry Booth, John G. Rogers, judges; Charles H. Reed, State's attorney; Timothy M. Bradley, sheriff of Cook county.

Attest: NORMAN T. GASSETTE, *Clerk.*

Be it remembered that heretofore, to wit, at the June term, to wit, on the 18th day of July, A. D. 1870, Henry W. Kingsbury, by Beckwith, Ayer & Kales, his solicitors, filed in said court his certain bill in words and figures following, to wit:

454 To the honorable judge of the circuit court of the county of Cook, in the State of Illinois, sitting in equity:

Humbly complaining, showeth unto your honor your orator, Henry W. Kingsbury, of Newport, in the State of Rhode Island, an infant under the age of twenty-one years, to wit, of the age of seven years and seven months or thereabouts, by Corydon Beckwith, his next friend—

That on or about the 26th day of June, A. D. 1856, Julius J. B. Kingsbury departed this life intestate, and was seized at the time of his death of the following-described real estate situate in the city of Chicago, county of Cook, and State of Illinois, to wit:

Lots numbered five (5) and six (6), in block thirty-five (35), in the original town of Chicago, and also all that part of the east half of the northwest quarter of section nine (9), in township thirty-nine (39) north, of range fourteen (14) east, of the third principal meridian, which lies east of the north branch of the Chicago river and south of the center of Ontario street, excepting, however, a small portion of the said last-described tract of land which the said
455 decedent had previously conveyed to Simon B. Buckner, the title to which portion remained in the said Buckner until on

or about the 15th day of May, A. D. 1861, when the same was conveyed by the said Buckner and wife to Henry W. Kingsbury, the father of your orator, as hereinafter more particularly stated.

That the said Julius J. B. Kingsbury at his death left him surviving his widow, Jane C. Kingsbury, who is still living, and two children, Mary K. Buckner, the wife of said Simon B. Buckner, and Henry W. Kingsbury, the father of your orator, who were his only heirs-at-law.

That on or about the 15th day of May, A. D. 1861, the said Simon B. Buckner and Mary K. Buckner, his wife, by their deed of that date duly executed and acknowledged, granted, bargained, sold, and conveyed to the said Henry W. Kingsbury, the father of your orator, one undivided half of lots numbered five (5) and six (6), in block number thirty-five (35), in the original town of Chicago above described, and also all their right, title, and interest in and to the other tract of land above described, situate in the northwest quarter of section nine (9), township thirty-nine (39) north, of
456 range fourteen (14) east, of the third principal meridian.

That afterwards, on or about the 4th day of December, A. D. 1861, the said Henry W. Kingsbury, the father of your orator, intermarried with Eva Taylor, he being at that time a citizen and resident of the State of Connecticut; that afterwards, on or about the 17th of September, A. D. 1862, the said Henry W. Kingsbury, father of your orator, was killed at the battle of Antietam, in the State of Maryland, he being at that time a citizen and resident of the State of Connecticut and colonel and commanding officer of a regiment of Connecticut volunteers engaged in the military service of the United States.

The said Henry W. Kingsbury at his death left him surviving his widow, Eva Kingsbury, the mother of your orator, who is still living; and afterwards, on the 16th day of December, A. D. 1862, there was born to him by his said widow a posthumous son, who is the complainant in this suit and the only heir-at-law.

That the said Henry W. Kingsbury, father of your orator,
457 died intestate and seized in fee simple of all real estate hereinbefore described, and your orator now holds all the said real estate by inheritance from his said father, subject to the dower estate of his said mother and of the said Jane C. Kingsbury therein, and also subject to certain incumbrances still outstanding against the said property or some portions thereof.

Your orator further shows unto your honor that the said Eva Kingsbury, mother of your orator, afterwards, on the 26th day of September, A. D. 1865, intermarried with one Albert G. Lawrence, and that she is now his wife.

Your orator further shows unto your honor that the said Jane C. Kingsbury afterwards, to wit, on the 8th day of October, A. D. 1868, filed her bill of complaint in the circuit court of Cook county, in the State of Illinois, against the said Eva Lawrence, Albert G. Lawrence, your orator, and one David J. Lake, who assumed to act as guardian of your orator, therein setting forth that she, the said Jane C. Kingsbury, was entitled to dower in the premises before described,

458 and praying that the same might be assigned to her, as by the said bill on file in this court will more fully appear, to which your orator refers and makes the same a part hereof, with the same advantage to himself as though the said bill were herein set forth at length.

That the said Eva Lawrence and Albert G. Lawrence afterwards, to wit, on the 9th day of October, A. D. 1868, filed their cross-bill in the said court and in the said cause against the said Jane C. Kingsbury, your orator, and the said David J. Lake, therein setting forth that the said Eva Lawrence was entitled to dower in the said premises above described, and praying that the same might be assigned to her, as by the said cross-bill on file in this court will more fully appear, to which reference is hereby made, with the same benefit to your orator as if the same were herein set forth at length.

Your orator further showeth unto your honor that afterwards, to wit, on the — day of ——, A. D. 1869, your orator, by his next friend, Evaline A. Taylor, filed his certain cross-bill in said
459 cause against Jane C. Kingsbury, Eva Lawrence, and Albert G. Lawrence and the said David J. Lake, praying, amongst other things, for the removal of the said David J. Lake from his said guardianship and for the appointment of a receiver of the income, rents, and profits of the said premises and to manage and lease the same, as by the said cross-bill filed in this court will more fully appear, to which reference is hereby made, and your orator prays the same benefit thereof as if the same were herein set out at length.

Your orator further showeth that afterwards such proceedings were had in said cause and cross-causes that it was thereupon decreed and declared by the court that the said Jane C. Kingsbury was entitled to dower in said premises, and that by reason thereof she was entitled to one-third of the rents and profits of the same, less one-third of the interest upon certain mortgages in said decree mentioned, and that said Eva Lawrence was entitled to dower in two-thirds of said premises, by reason whereof she was entitled to two-ninths of the income of said premises, less two-ninths of the interest upon certain mortgages in said decree mentioned,
460 and that your orator was entitled to the residue of the income of said premises after paying his proportion of the interest upon said mortgages, and that in and by said decree John Woodbridge, Esquire, was appointed receiver of the entire income of said premises accruing and to accrue, with power to lease and manage the same under the direction of the court, and with direction to pay out of said income to said Jane C. Kingsbury and Eva Lawrence the sums to which they were, respectively, entitled, and providing for your orator's support and maintainance, as well as for the payment of the interest upon said mortgages and other expenses incident to the care and management of said property, as by the record and proceedings in said cause will more fully appear, and which your orator makes a part of this his bill of complaint, and craves leave to refer thereto, with the same benefit to himself as if they were here set forth at length.

461 Your orator further showeth unto your honor that afterwards, to wit, on the day and year aforesaid, the said John Woodbridge accepted the office of and was duly qualified as such receiver as aforesaid, and then and there entered upon his duties as such receiver under and in pursuance of the decree of this court made as aforesaid, and that he hath from thence hitherto been and still is such receiver as aforesaid.

Your orator further showeth unto your honor that he is informed and believes the said Henry W. Kingsbury, the father of your orator, in his lifetime, to wit, on the 25th day of March, A. D. 1862, at Fortress Monroe, in the State of Virginia, wrote with his own hand and signed a paper, of which "Exhibit A," hereto attached, is a correct copy, and that he then and there delivered the same to John McLean Taylor, therein named, for safe-keeping.

And your orator further showeth in this behalf that his said father was not, at the time of the execution of said paper, an inhabitant or resident of said State of Virginia, and that he was not such inhabit-

462 ant or resident at any time thereafter nor at the time of his death, and that he had no property of any kind whatever in said State of Virginia at the time of his death nor for a long time prior thereto.

Your orator further showeth that he is advised and believes that afterwards, on the 9th day of May, A. D. 1870, the said paper purporting to be the last will and testament of Henry W. Kingsbury, a copy whereof is hereto annexed as aforesaid, was presented to the corporation court of the city of Alexandria, in the State of Virginia, and such proceedings were thereupon had as that the said court ordered the said writing to be recorded as the true last will and testament of the said Henry W. Kingsbury, father of your orator, and that afterwards, on the 10th day of May, A. D. 1870, Ambrose E. Burnside, named in the said paper as one of the executors, assumed to qualify as such, as by a copy of the proceedings in the said court, hereunto annexed, will more fully appear, which are [is] made a part hereof and to which reference is made with the same benefit as though the same were herein set out at length.

Your orator further showeth that the said court in the

463 State of Virginia had no jurisdiction to allow the probate of the said will or the same to be recorded in manner and form as the same was done, and that such probate and record are utterly void and of no effect against your orator, and that neither your orator nor the said Jane C. Kingsbury, Eva Lawrence, Albert G. Lawrence, nor John McLean Taylor had any notice of the said application to and proceedings in the said court in the State of Virginia.

Your orator further showeth that afterwards, to wit, on the 11th day of July, A. D. 1870, the said Ambrose E. Burnside presented to the county court of Cook county, in the State of Illinois, a petition in writing setting forth that said Henry W. Kingsbury, father of your orator, departed this life in Maryland, leaving a last will and testament duly signed in the State of Virginia, which had been duly proved in the said State, a certified copy of which he presented to

the said court for record, and praying that letters testamentary might be granted to him, the said Ambrose E. Burnside, as one of the executors of the said will.

464 Your orator further showeth that such proceedings were thereupon had that the said county court of Cook county, on the 11th day of July, 1870, ordered that the said paper and proof thereof be recorded in said court and that the same be treated and considered as good and available in law in like manner as a will executed in this State.

Your orator further showeth that the said proceeding in the said county court of Cook county was had without notice to your orator or to the said Jane C. Kingsbury, Eva Lawrence, A. G. Lawrence, or John McLean Taylor, and that such proceedings ought to be held and adjudged of no force and effect as to your orator's rights, but that such proceedings clouds the title and rights of your orator and will, unless restrained, seriously embarrass the administration of his property by the officers of this court.

Your orator further showeth unto your honor that after making of the said paper, called the last will and testament of the father of your orator, your orator was born, and that no provision was made

465 in the said paper for your orator, and that it does not appear by said paper that it was the intention of your orator's father to disinherit your orator; and that by reason of these facts, even if the said paper was a valid will, your orator would be entitled to receive out of the estate of his father the same as if he had died intestate, and that, being the sole and only heir of his father, he inherited the whole of his father's estate, subject to the dower of his mother and other incumbrances thereon.

Your orator further showeth that the said paper so produced as the last will and testament of the said Henry W. Kingsbury, the father of your orator, was not signed by him in the presence of any attesting witness nor was the same attested in the presence of the said Henry W. Kingsbury by any witness, and your orator alleges that the said writing was not executed with the requisite forms and solemnities to make the same good and available in law for the granting, conveying, and assuming the lands, tenements, hereditaments, moneys, goods, and chattels therein and thereby supposed to be given, granted, and bequeathed.

466 And your orator contests the validity of the said instrument and respectfully insists that the proceedings of the said county court of Cook county, hereinbefore referred to, ought to be reversed and set aside.

And your orator well hoped that no disputes would have arisen touching the rights of your orator in the premises.

But now so it is, may it please your honor, that the said Ambrose E. Burnside, combining and confederating with the other defendants hereinafter named, or some of them, alleges and pretends that the said instrument was executed with all the formalities required by the laws of the State of Virginia relating to the execution of last wills and testaments, and that since the said instrument was written and signed by the said Henry W. Kingsbury, father of your

orator, in that State, it is entitled to probate in — State of Illinois and is good and available in law in this State in like manner as wills made and executed here according to the forms and solemnities required by the laws of Illinois; whereas your orator charges the contrary and that the said Henry W. Kingsbury, deceased, was never a citizen of the State of Virginia nor was he ever dom-
467 iciled in that State, but at the time of making and signing the said instrument he was and ever after continued to be during his life a citizen and resident of the State of Connecticut; that he did not die in the State of Virginia, and was seized of no estate, either real or personal, in that State at the time of death.

Your orator further charges that the said instrument is ineffectual to operate as a valid will according to laws either of the place of his domicile or of the State of Maryland, where he died, or either of the States where any portion of his property, real or personal, was locally situate, for want of the requisite forms and solemnities to give the same effect, and your orator respectfully submits that under the facts and circumstances aforesaid the instrument is not entitled to probate by the laws of this State.

Your orator further showeth that Jane C. Kingsbury, Mary J. Buckner, wife of Simon B. Buckner; John J. D. Kingsbury, and Eva Lawrence, wife of Albert G. Lawrence, are named in the said instrument as devisees or legatees, and that they or some one or more of them claim thereunder some interest in the estate of your
468 orator, whereas your orator charges that they have not nor has either of them acquired any interest in the said estate by virtue thereof.

In consideration whereof and forasmuch as your orator is entirely remediless in the premises, according to the strict rule of the common law, and can only have adequate relief in a court of equity, where matters of this kind are properly cognizable and relievable—

To the end, therefore, that the said defendants may severally answer all and singular the matters hereinbefore stated and charged, but not upon oath (the necessity of answering under oath being hereby expressly waived), and that the said instrument hereinbefore referred to, purporting to be the last will and testament of the said Henry W. Kingsbury, deceased, may be declared invalid and of no legal force or effect as a last will and testament; that the proceedings of the county court of Cook county, hereinbefore referred to, admitting the said instrument to record and directing that the same be treated as good and available in law in like manner as wills executed in this State, may be reversed and set aside or declared to be null
469 and void as constituting a cloud upon your orator's title to the real estate hereinbefore described.

That your orator's right and title by inheritance to the estate hereinbefore mentioned as the posthumous son and only heir-at-law of the said Henry W. Kingsbury, deceased, may be confirmed and established, and that in the meantime the said Ambrose E. Burnside and certain of the other defendants hereinafter mentioned may be enjoined and restrained from interfering or intermeddling with the said estate claimed by your orator as aforesaid, or with the rents,

issues, or profits thereof, and from attempting in any way to obstruct or interfere with the said John Woodbridge in the performance of his duties as receiver aforesaid, and that in the final hearing of this cause the said injunction may be — perpetual, and that your orator may have such other and further relief in the premises as the nature of his case may require and to your honor may seem meet—

May it please your honor to grant to your orator not only the people's writ of injunction issuing out of and under the seal of this honorable court, to be directed to the said Ambrose E. Burnside,
470 Mary J. Buckner, Simon B. Buckner, John J. D. Kingsbury, restraining them, their agents and attorneys, in the manner hereinbefore prayed, but also the people's writ of summons, to be directed to the said Ambrose E. Burnside, Jane C. Kingsbury, Mary J. Buckner, Simon B. Buckner, John J. D. Kingsbury, Eva Lawrence, and Albert G. Lawrence, thereby commanding them and every of them, at a certain day and under a certain pain therein to be specified, personally to be and appear before your honor in this honorable court, and then and there to answer all and singular the premises, and to stand to, perform, and abide such order and decree therein as to your honor shall seem meet; and your orator shall ever pray.

HENRY W. KINGSBURY,
By his next friend, C. BECKWITH.

BECKWITH, AYER & KALES,
Solicitors for Complainants.

STATE OF ILLINOIS, } ss:
Cook County, }

Corydon Beckwith, being duly sworn, says he is the next friend of the said Henry W. Kingsbury, a minor, the complainant named in the foregoing bill; that he has read the said bill of com-
471 plaint and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

CORYDON BECKWITH.

Subscribed and sworn to before me this 16th day of July, A. D. 1870.

[SEAL.] JAMES S. MURRAY,
Notary Public.

In the County Court of Cook County.

STATE OF ILLINOIS, } ss:
Cook County, }

To the Honorable M. R. M. Wallace, judge of said court:

The petition of Ambrose E. Burnside respectfully showeth that he is a resident of Rhode Island; that on the — day of September, A. D. 1862, Henry W. Kingsbury departed this life at Maryland,

leaving a last will and testament, duly signed, as your petitioner believes, in the State of Virginia, and which has been duly proved in said State, a certified copy of which he now presents to your honor for record.

That the said testator in said will nominated your petitioner as one of the executors thereof; that the said deceased left prop-
472 erty and effects as follows:

An interest in a large amount of real estate in the county of Cook and State of Illinois.

That the value of the whole estate of said deceased does not exceed — dollars.

That the said deceased left an infant son, Henry W. Kingsbury, his only heir-at-law.

Wherefore your petitioner prays that the said will may be admitted to record according to the laws of the State of Illinois, and that all orders necessary may be made.

AMBROSE E. BURNSIDE,
By GOUDY & CHANDLER,
His Attorneys.

STATE OF ILLINOIS, } ss:
Cook County, }

William C. Goudy, being duly sworn, says that the foregoing petition is true.

W. C. GOUDY.

Sworn to and subscribed before me, John C. Gindele, clerk of the county court of Cook county, this 11th day of June, A. D. 1870.

JOHN G. GINDELE.

Filed July 11th, 1870.

JOHN G. GINDELE, *Clerk.*

473 Expecting soon to start upon a military expedition where death may overtake me, I leave this as a record of my wishes respecting the disposition of my property:

To my mother, Jane C. Kingsbury, I leave twenty thousand dollars, or so much of my Chicago property as upon fair appr-isal may be valued at that amount.

To my sister, Mary J. Buckner, I leave as much of the Chicago property held in my name as shall amount to one-third of the property in the city of Chicago, Illinois, left by my father, Julius J. B. Kingsbury, deceased.

To my cousin, John J. D. Kingsbury, I leave my property in Waterbury, Conn., and in addition thereto five thousand dollars. I trust he will expend it in completing his education.

The remainder of my property of every description I leave to my devoted wife, Eva. I desire, moreover, that the provisions of this will be so carried out that the yearly income of my wife for her own personal support shall never be less than two thousand dollars.

As executors I name Ambrose E. Burnside, of Rhode Island, and Capt. John Taylor, commissary department, U. S. Army.

474 Signed at Fortress Monroe, Va., March 25th, 1862.

HENRY W. KINGSBURY,
First Lieutenant 5th Regiment Artillery, U. S. Army.

STATE OF VIRGINIA,
Corporation Court of the City of Alexandria.

A writing purporting to be the last will and testament of Henry W. Kingsbury was produced in court by C. W. Wattles, and, there being no subscribing witness thereto, S. B. Buckner and Charles H. Hatch were sworn, and deposed that they are well acquainted with the testator's handwriting and verily believe the said writing and the name thereto subscribed to be written by the testator's own hand; whereupon the said writing is ordered to be recorded as the true last will and testament of the said Henry W. Kingsbury, deceased; and at a corporation court for the city of Alexandria, continued and held on the 10th day of May, 1870, Ambrose E. Burnside, one of the executors named in the last will and testament of Henry W. Kingsbury, deceased, on motion of C. W. Wattles,
475 has leave to qualify; whereupon he executed his bond, with James M. Stewart his security, in the penalty of five hundred dollars, conditioned according to law.

STATE OF VIRGINIA,
Corporation Court of the City of Alexandria. *ss:*

I, Morton Marye, clerk of the corporation court of the city of Alexandria, in the State of Virginia, do hereby certify that the foregoing is a true and complete copy of the last will and testament of Henry W. Kingsbury, deceased, and of the proof thereof before said court, as the same appears of record in my office; and I further certify that the said will was duly executed and proved agreeably to the laws and usages of the State of Virginia, in which the same purports to have been executed.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court this 5th day of July, 1870.

[SEAL.] MORTON MARYE, *Clerk.*

STATE OF VIRGINIA,
Alexandria City, *ss:*

I, Enoch M. Lowe, only judge of the corporation court of
476 the city of Alexandria, in the State of Virginia, do hereby certify that Morton Marye, who hath given the preceding certificate, is clerk of said court, and that his attestation is in due form.

Given under my hand this 5th day of July, A. D. 1870.

E. M. LOWE,
Judge of the Corporation Court of the City of Alexandria.

Filed July 11th, 1870.

In the Matter of the Estate of HENRY W. KINGSBURY.

And now comes Ambrose E. Burnside, one of the executors named in the will herein mentioned, by his attorneys, Goudy and Chandler, and presents a copy of the last will and testament of Henry W. Kingsbury, deceased, and the proof thereof before the corporation court of the city of Alexandria, in the State of Virginia, with a certificate of the clerk of said court, with the seal of said court, that the same is a true and complete copy of the last will and testament of Henry W. Kingsbury, deceased, and of the proof thereof before said court, as the same appears of record in his office, and that the said will was duly executed and proved agreeably to the laws
477 and usages of the State of Virginia, in which the same purports to have been executed, and with a certificate of the only judge of said court to the official character of said clerk, and that the attestation is in due form, and moves the court to admit the same to record.

And it appearing to this court that the said last will and testament of Henry W. Kingsbury, deceased, was executed and proved agreeably to the laws and usages of the State of Virginia, in which the same was executed, and that the copy of said will and the probate thereof is duly certified according to the laws of the State of Illinois, and that said will touches and concerns real estate and other property in the State of Illinois—

It is by the court ordered that the said will and proof thereof, certified as aforesaid, be recorded, and that the same be treated and considered as good and available in law in like manner as wills executed in this State.

M. R. M. WALLACE.

Entered July 11, 1870.

Let the injunction issue in accordance with the prayer of
478 the foregoing bill upon complainant filing an injunction bond, conditioned according to law, in the penal sum of five thousand dollars, with such surety or sureties thereon as may be approved by the clerk of this court.

E. S. WILLIAMS,
Judge of 7th Judicial Court, Ills.

And afterwards, to wit, on the 31st day of October, A. D. 1870, Mary K. Buckner and Simon B. Buckner, by Goudy and Chandler, their solicitors, filed in said court their certain joint and several answer in the words and figures following, to wit:

STATE OF ILLINOIS, } ss :
Cook County, }

Circuit Court. October Term, 1870.

HENRY W. KINGSBURY
vs.
AMBROSE E. BURNSIDE *et al.* } In Chancery.

The joint and several answer of Mary K. Buckner and Simon B. Buckner to the bill of complaint of Henry W. Kinsbury, a minor, who sues by his next friend, Corydon Beckwith, against Ambrose E. Burnside, Jane C. Kingsbury, Mary J. Buckner, Simon B. Buckner, John J. D. Kingsbury, Eva Lawrence, and Albert G. Lawrence.

479 These respondents, saving and reserving to themselves all benefit of exception to the many errors, uncertainties, and manifest insufficiencies in the said bill of complaint contained, protesting that the same and the matters and things therein contained are not sufficient to require any answer thereto, and praying the same advantage on the final hearing hereof as if they severally demurred to the said bill of complaint, for answer thereunto, or to so much thereof as they are advised is necessary or material to be answered unto by these respondents, they admit that on or about the 26th day of June, A. D. 1856, Julius J. B. Kingsbury died intestate and seized in fee simple, subject to certain incumbrances, of real estate situated in the city of Chicago, county of Cook, and State of Illinois, to wit:

Lots numbered five and six, in block thirty-five, in the original town of Chicago, and also all that part of the east half of the northwest quarter of section nine, in township thirty-nine north, of range fourteen east, of the third principal meridian, which lies east of the North Branch of Chicago river and south of the center of Ontario

480 street; and they aver that although a small part thereof had been conveyed to the respondent, Simon B. Buckner, by the said Julius J. B. Kingsbury in his lifetime, yet the conveyance was without consideration and did not confer any beneficial interest to the grantee, but said property was actually owned by said Kingsbury at his death; and they aver that the said Julius J. B. Kingsbury died seized of a large tract of land in the east half of the northwest quarter of section nine aforesaid than that described in the bill of complaint, and the same is fully described in a deed, dated May 30th, 1833, executed by James Kinzie and wife to said Kingsbury.

And they admit that the said Julius J. B. Kingsbury left surviving him Jane C. Kingsbury, his widow, and two children—the respondent, Mary K. Buckner, and Henry W. Kingsbury, now deceased; and these respondents aver that the title to said real estate, as the same was vested in the said Julius J. B. Kingsbury, descended to and vested in the respondent, Mary K. Buckner, and the said Henry W. Kingsbury, subject to the right of dower therein of the widow, Jane C. Kingsbury, and the respondent, Mary K. Buckner,

being then the wife of the respondent, Simon B. Buckner, and,
481 there being issue living born of such marriage in the year 1858, an invitiate estate as tenant, by the courtesy to an undivided half of said real estate, subject to such dower estate, also vested in the said Simon B. Buckner.

And these respondents, further answering the said bill of complaint, aver that at the time of the death of the said Julius J. B. Kingsbury the said Henry W. Kingsbury was a minor, and the respondent, Simon B. Buckner, had the control and management of said property until it was placed in the hands of Ambrose E. Burnside, as hereafter stated; and these respondents, further answering the bill of complaint, admit that a deed, dated May 15th, 1861, signed, sealed, and acknowledged, as appears therefrom, purporting to convey to the said Henry W. Kingsbury, now deceased, an undivided half of the real estate hereinbefore described, was signed and acknowledged in the manner shown by said deed, and they attach hereto a copy thereof, marked "Exhibit 1," as a part of this answer, but they expressly deny that they granted, bargained, sold, and conveyed the title to said real estate as alleged in the
482 bill of complaint; but, on the contrary, the respondent, Mary K. Buckner, is advised that said indenture was not acknowledged according to the laws of the State of Illinois in such a manner as to pass her title to said property to the grantee, and therefore she avers that said deed or indenture is null and void as to her; and these respondents say that said deed or indenture was prepared, signed, and acknowledged on the day of its date in the city of Louisville, in the State of Kentucky, where they then resided; that the said Henry W. Kingsbury was not present at the time and had no information or knowledge whatever that such instrument of writing was to be made or was being made, and such deed was then sent by the respondent, Simon B. Buckner, to his agent in Chicago, with directions to file the same for record, which was done on the 17th day of May, 1861, which was the only delivery of such deed ever made to the said Henry W. Kingsbury; and these respondents aver that the said Henry W. Kingsbury had no information or knowledge whatever that any such deed or indenture had been made for two months thereafter; and they further aver that the
483 same was so made as aforesaid without any consideration, contract, bargain, or promise whatever; and these respondents aver that, while the said Henry W. Kingsbury was ignorant as aforesaid in regard to said transaction, the sole purpose of the respondents in making said deed was to vest in the said Henry W. Kingsbury the legal title to the property described in such deed or indenture, to hold the same in trust and not to create in him any beneficial interest whatever. These respondents, having full confidence in the affection and integrity of the said Henry W. Kingsbury, voluntarily made such deed in the manner aforesaid, believing that he would not claim the rents and profits and would convey or reconvey the premises on request.

And the respondent, Simon B. Buckner, for himself, says that it was his own desire and purpose to waive any interest or claim in

said property for the benefit of his wife in order that she might have and enjoy all the property descendent from her father
484 and that the control of the same might be placed in her own family, and while he now claims his rights in equity and under the law it is still with the desire and purpose to effectually divest himself in some legal and appropriate manner of all claim to such property, and he hereby offers to submit to any decree the court may deem proper to make to that end.

And these respondents aver that the said Henry W. Kingsbury frequently, after he was informed of the facts and at all times during his lifetime, admitted that he held the title to said property described in the deed of May 15th, 1861, in trust, and that he had no right or ownership for himself whatever, and that he at some time expressed an intention to declare said trust in his will or reconvey the same.

And these respondents express their confident belief that the said Henry W. Kingsbury would always have recognized the equitable and just claim of these respondents, and that if he had lived this controversy would never have arisen.

And these respondents aver that some time in the month of December, 1859, Henry W. Kingsbury and these respondents made an arrangement with Ambrose E. Burnside to take charge of
485 said property as an agent for them and Mrs. Jane C. Kingsbury, because the respondent, Simon B. Buckner, resided at Louisville, Kentucky, and Henry W. Kingsbury was then a cadet at West Point, while said Burnside resided at Chicago, with the understanding that the said Burnside should receive directions from said Buckner.

And these respondents aver that the said Henry W. Kingsbury during his lifetime made no claim to the rents and profits of such real estate described in the deed of May 15, 1861, but the same were received and controlled as before such deed was made by said agent, Ambrose E. Burnside, acting for Mrs. Jane C. Kingsbury, Henry W. Kingsbury, and these respondents, and were applied for the benefit of all of them in the same manner as if no such deed had been made and no possession was ever taken or entry made under said deed by the said Henry W. Kingsbury or any other person.

And these respondents, answering the said bill of complaint, say that on the 25th day of March, 1862, at Fortress Monroe, in the State of Virginia, the said Henry W. Kingsbury, who was then first lieutenant in the 5th regiment of artillery in the United
486 States Army and in the military service, and engaged in the civil war then existing, wrote with his own hand and signed his last will and testament as follows, to wit:

"Expecting soon to start upon a military expedition where death may overtake me, I leave this as a record of my wishes respecting the disposition of my property.

To my mother, Jane C. Kingsbury, I leave twenty thousand dollars, or so much of my Chicago property as upon a fair appraisal may be valued at that amount.

To my sister, Mary J. Buckner, I leave so much of the Chicago property held in my name as shall amount to one-third of the property in the city of Chicago, Ill., left by my father, Julius J. B. Kingsbury, deceased.

To my cousin, John J. B. Kingsbury, I leave my property in Waterbury, Connecticut, and, in addition thereto, five thousand dollars, which I trust he will expend in completing his education. The remainder of my property of every description I leave to my devoted wife, Eva.

I desire, moreover, that the provisions of this will may be
487 so carried out that the yearly income of my wife for her own personal support shall never be less than two thousand dollars ($2,000).

As executors I name Gen. Ambrose E. Burnside, of Rhode Island, and Capt. John Taylor, commissary department, U. S. Army.

Signed at Fortress Monroe, Va., March 25th, 1862.

HENRY W. KINGSBURY,
First Lieutenant 5th Regiment Artillery, U. S. Army."

And these respondents aver that the only property in Chicago vested in the said Henry W. Kingsbury at the time of making said will or at any other time was the real estate which the said Julius J. B. Kingsbury left at his death, and which descended to the said Henry W. Kingsbury and the respondent, Mary K. Buckner, subject to the right of dower of Jane C. Kingsbury; and they also aver that the only transfer, grant, conveyance, or devise of property in Chicago ever made to the said Henry W. Kingsbury was made by the said deed or indenture of the 15th day of May, 1861, hereinbefore described, and therefore they aver that the only Chicago property held in the name of said Henry W. Kingsbury
488 for the use of any person was the property described in the deed of May 15th, 1861, so held as aforesaid in trust.

And these respondents, further answering the said bill of complaint, admit that the said Henry W. Kingsbury, at the time mentioned in the bill, intermarried with Eva Taylor, and that he was killed at the battle of Antietam, at the time named in the bill, and left surviving him his widow, Eva, and that after his death a posthumous son was born, as stated in the bill, who became the heir-at-law and is the complainant in this suit.

And these respondents admit that said Henry W. Kingsbury died seized of an undivided half of the real estate hereinbefore described as descended from the said Julius J. B. Kingsbury, subject to the right of dower of the said Jane C. Kingsbury and the certain incumbrances thereon, but they deny that he was the real owner of more than an undivided half thereof, and they deny that he died intestate.

And these respondents admit that the said Eva Kingsbury married Albert G. Lawrence at the time stated in the bill, and that she is now his wife.

489 And these respondents, further answering the bill of complaint, admit that on the 8th day of October, 1868, the said Jane

C. Kingsbury filed her bill in chancery in the circuit court of Cook county, in the State of Illinois, against the complainant, Eva Lawrence, Albert G. Lawrence, David J. Lake, guardian of the complainant, praying for an assignment of dower in the premises hereinbefore described.

That on the 9th day of October, 1868, the said Eva Lawrence and Albert G. Lawrence filed a cross-bill in said cause against Jane C. Kingsbury, the complainant, and David J. Lake, guardian of the complainant, praying for the assignment of dower in said premises, and that afterwards a cross-bill in the name of the complainant, by next friend, Evaline A. Taylor, was filed in said cause against the said Jane C. Kingsbury, Eva Lawrence, Albert G. Lawrence, and David J. Lake, praying for the removal of the said David J. Lake from the guardianship and for the appointment of a receiver to lease said premises and receive the rents and profits, etc.; but they make no admission as to the contents of said bills, and ask
490 that the same be produced in evidence upon the final hearing of this cause.

And these respondents admit that John Woodbridge was appointed receiver according to the prayer of said last-named cross-bill, but otherwise they neither admit nor deny the statements of the bill of complaint in regard to the proceedings in said causes, and they ask that proof be required thereof by the production of the records therein.

And these respondents, further answering the bill of complaint, admit that on the 25th day of March, 1862, the said Henry W. Kingsbury, father of the complainant, and in his lifetime, at Fortress Monroe, in the State of Virginia, wrote with his own hand and signed a paper, of which "Exhibit A," attached to the bill, is a true copy, and that he left the same at some place or with some person to these respondents unknown; and they deny the statement that the father of the complainant was not at the time of the execution of said paper an inhabitant or resident of the State of Virginia, and that he was not such resident or inhabitant thereafter; and they also deny the statement of the bill that he had no property of any
491 kind in the State of Virginia at the time of his death nor for a long time prior thereto; but, on the contrary, they aver that the said Henry W. Kingsbury was an inhabitant of the State of Virginia, and that he had property and estate in said State at the time said paper was proven as the last will and testament of the said Henry W. Kingsbury in the State of Virginia.

And these respondents admit that on the 9th day of May, 1870, the said paper, a copy of which is given as "Exhibit A," was presented to the corporation court of the city of Alexandria, in the State of Virginia, and such proceedings were thereupon had that the said court ordered that the said writing be recorded as the last will and testament of the said Henry W. Kingsbury, and that the respondent, Ambrose E. Burnside, named as one of the executors, duly qualified as an executor; and they aver that said paper-writing was the last will and testament of the said Henry W. Kingsbury, that the said court had jurisdiction of such proceedings before

it, and that the order and judgment of said court are conclusive of the question decided by it, and that thereby the said last will
492 and testament was admitted to probate, so that the same cannot be questioned in this or any other court.

And these respondents admit that on the 11th day of July, 1870, the defendant, Ambrose E. Burnside, presented a petition to the county court of Cook county, in the State of Illinois, together with a duly certified copy of said last will and testament of Henry W. Kingsbury, deceased, and the probate thereof, as required by the statute of the State of Illinois in such cases made and provided, and such proceedings were thereupon had that an order was entered admitting the same to record in the said court, as will more fully appear by the certified copy thereof which will be produced on the final hearing of this cause.

And these respondents aver that within twenty days after the entry of such order the complainant prayed an appeal from said order to the circuit court of Cook county, Illinois, and the same was allowed, and such appeal is now pending and undetermined in this court.

And these respondents admit that the complainant was
493 born after the death of his father, and that there is *is* no provision in said will for him, and they aver that by the laws of the State of Virginia, where such will was made and proven, said posthumous birth did not revoke said will or any part thereof, but required the will to be so construed that it should read as if the devises and bequests therein had been limited to take effect in the event that the child shall die under age of twenty-one years unmarried and without issue.

And, as to the effect of such posthumous birth on the title to the real estate in Illinois, these respondents are advised that the same is a question of law arising on the admitted facts, and they submit the same to the decision of the court; but these respondents hope and believe that the judgment of the court will give to the complainant all of such real estate in Illinois that justly belonged to his father as if he had died intestate.

And these respondents deny that said will was not executed with the forms and solemnities to make the same good and available in law for granting and conveying lands, tenements, hereditaments, moneys, goods, and chattels, as stated in said bill of
494 complaint; but, on the contrary, they aver that the same was written, executed, published, and proved in all respects according to the laws of the State of Virginia, where the same was made and proved and where the testator had estate, and that the corporation court of the city of Alexandria, in said State of Virginia, had full jurisdiction to decide the question as to the validity of such will and admit the same to probate, as was in fact done, and, according to the provisions of the statute in Illinois, the same being certified as required by said statute and recorded in the county of Cook aforesaid, became good and available in law in like manner as wills made and executed in the State of Illinois.

And these respondents, further answering the bill of complaint,

deny that the said Henry W. Kingsbury, now deceased, was a citizen, resident, or inhabitant of the State of Connecticut, as alleged in the bill; but they aver that Julius J. B. Kingsbury, the father of Henry W. Kingsbury, was, at the time the latter was born and for a long time prior thereto, an officer in the United States Army,
495 and had no fixed residence or place of abode; that the said Henry W. Kingsbury was appointed in his boyhood a cadet at West Point and credited to the congressional district embracing Brooklyn, New York; that he passed through the regular course at that institution and was appointed a lieutenant in the United States Army, and entered upon active service and continued in the same until his death; and these respondents claim that the said Henry W. Kingsbury never acquired a residence or citizenship, within the meaning of the law, in any particular State, although he was a citizen of the United States and in its service and an inhabitant of such places as he happened to be ordered to in the discharge of his official duties.

And these respondents deny all fraud and combination charged in the bill.

And these respondents deny all statements of the bill of complaint necessary and material to be answered by them which are not herein confessed or avoided.

And now, having fully answered the said bill of complaint,
496 these repondents severally pray to be dismissed hence with their reasonable costs in this behalf sustained, &c.

S. B. BUCKNER.
MARY K. BUCKNER.

GOUDY & CHANDLER,
Solicitors for said Respondents.

497 EXHIBIT 1.

Be it known that Simon B. Buckner & Mary K. Buckner, his wife, of the city of Louisville and State of Kentucky, in consideration of the sum of one dollar and the natural love and affection we bear to our brother, Henry W. Kingsbury, do hereby grant, bargain, sell, and convey to said Henry W. Kingsbury, of the United States Army, his heirs and assigns forever, the following property, viz:

One undivided half of lots numbered five (5) and six (6), in block number thirty-five (35), in the original town of Chicago, in the county of Cook and State of Illinois, and also all our right, title, and interest in the "Kingsbury tract," so called, being the tract of thirty-five acres, more or less, purchased from James Kinzie by the late Major Julius J. Kingsbury, of the United States Army, as per deed of said Kinzie on record in the clerk's office of Cook county, Illinois, the said tract being the south half of what remains of the northwest quarter of section nine (9), in township thirty-nine, range fourteen, in said Cook county, Illinois, after deducting therefrom the town of Waubansia.

498 The other interest in said land and tenements, etc., included in this deed now belongs to said Henry W. Kingsbury

as one of the heirs of the late Major J. J. Kingsbury, and the entire property being subject to the dower interest of Mrs. Jane C. Kingsbury:

To have and to hold the same to the said grantee, his heirs and assigns forever, the grantor covenanting that — will warrant the property hereby conveyed.

In witness whereof we have hereunto set our hands and seals, at Louisville, this fifteenth day of May, 1861.

SIMON B. BUCKNER. [SEAL.]
MARY K. BUCKNER. [SEAL.]

499 STATE OF KENTUCKY, }
County of Jefferson, } *sct:*

Be it remembered that on the fifteenth day of May, A. D. 1861, before me, C. S. Thomasson, a notary public in and for said county and State, duly commissioned and qualified, personally appeared Simon B. Buckner and Mary K. Buckner, his wife, who are personally known to me to be the persons whose names are subscribed to the foregoing deed as having executed the same for the uses and purposes therein expressed.

And the said Mary K. Buckner, wife of the said Simon B. Buckner, being of lawful age, and having been by me examined separate and apart from her said husband, and the contents of the deed fully made known and explained to her, acknowledged that she had — the same (and relinquished her dower in the lands and tenements therein mentioned) voluntarily and without compulsion of her said husband.

In witness whereof I have hereunto set my hand and affixed my official seal this fifteenth day of May, A. D. 1861.

[SEAL.] C. S. THOMASSON,
Notary Public for Jefferson County, State of Kentucky.

500 And afterwards, to wit, on the 22d day of November, A. D. 1870, Jane C. Kingsbury, by Goudy & Chandler, her solicitors, filed in said court her separate answer in the words and figures following, to wit:

STATE OF ILLINOIS, }
Cook County. }

October Term, Circuit Court, 1870.

HENRY W. KINGSBURY, by His Next Friend, CORYDON BECKWITH,
vs.
AMBROSE E. BURNSIDE. } In Chancery.

The separate answer of Jane C. Kingsbury to the bill of complaint of Henry W. Kingsbury, by his next friend, Corydon Beckwith, against Ambrose E. Burnside, Jane C. Kingsbury, Mary J. Buckner, John J. D. Kingsbury, Eva Lawrence, and Albert G. Lawrence.

The respondent, saving and reserving to herself all benefit of exception to the many uncertainties and manifest insufficiencies in the said bill of complaint contained, protesting that the same and the matters and things therein stated are not sufficient to require any answer thereto, and praying the same advantage in the final hearing thereof as if she demurred to the said bill of complaint, for
501 answer thereunto, or so much as she is advised it is necessary or material to be answered by her—

She admits that on or about the 26th day of June, 1856, Julius J. B. Kingsbury died intestate and seized of the real estate described in the bill, leaving this respondent as his widow and two children, Mary K. Buckner, the wife of Simon B. Buckner, and Henry W. Kingsbury, who were his only heirs-at-law.

And this respondent admits that on the 15th day of May, 1861, the said Simon B. Buckner and Mary K. Buckner made a deed of that date purporting to grant, bargain, sell, and convey to Henry W. Kingsbury the property described in the bill; but this respondent, upon her information and belief, denies that in and by said deed the said property was bargained and sold to the said Henry W. Kingsbury; but, upon the contrary, upon such information and belief, she avers that said conveyance was a deed of trust intended only to vest the said Henry W. Kingsbury with the legal title to said premises, to hold in trust for the use and benefit of his sister, Mary K. Buckner, and her children, and so far as said
502 property was owned by Simon B. Buckner for his use and benefit.

And this respondent admits that on the 4th of December, 1861, the said Henry W. Kingsbury married Eva Taylor, and that on the 17th day of September, 1862, he was killed at the battle of Antietam, in the State of Maryland; that he left surviving him his widow, Eva, and afterwards, on the 16th day of December, 1862, there was born to him by his said widow a posthumous son, who was named Henry W. Kingsbury after his father, and who is the complainant in this suit.

And she further admits that the said Eva Kingsbury married Albert G. Lawrence at the time mentioned in the bill of complaint.

And this respondent, further answering, admits that on the 8th day of October, 1868, she filed her bill of complaint in the circuit court of Cook county, in the State of Illinois, against the said Eva Lawrence, Albert G. Lawrence, Henry W. Kingsbury, and David J. Lake, as set forth in the bill of complaint; that the said Eva Lawrence and Albert G. Lawrence, on the 9th day of October, 1868, filed their cross-bill in said court and in said cause against this
503 respondent, Henry W. Kingsbury, and David J. Lake, as set forth in the bill of complaint; that on the — day of ——, 1869, the said Henry W. Kingsbury, by Evaline A. Taylor, as his next friend, filed a cross-bill in said cause against this respondent, Eva Lawrence, Albert G. Lawrence, and David J. Lake, as set forth in the bill of complaint; and this respondent admits that such proceedings were had that it was decreed by the court that the respondent was entitled to dower in the premises described in the bill, and that she was entitled to one-third of the rents and profits of the same, less one-third of the interest upon certain mortgages in that decree mentioned, and that Eva Lawrence was entitled to dower in two-thirds of said premises, and entitled to two-ninths of the income of the premises, less two-ninths of the interest upon certain mortgages in the decree mentioned, and that the said Henry W. Kingsbury was entitled to the residue of the income after paying his portion of the interest upon the mortgages, and that in and by said decree John Woodbridge was appointed receiver of the income of the
504 premises, with power to rent and manage the property under the direction of the court, and with direction to pay out of said income to this respondent and Eva Lawrence the sums to which they are respectively entitled, and providing for the support and maintainance of the complainant, and she admits that the said John Woodbridge accepted the office of receiver, was duly qualified, and entered upon the discharge of his duties.

And this respondent, further answering, admits that Henry W. Kingsbury, her son, on the 25th day of March, 1862, at Fortress Monroe, in the State of Virginia, wrote with his own hand and signed a paper, of which "Exhibit A" attached to the bill is a correct copy. And she further says, upon the advice of counsel, that such paper is and was the last will and testament of said Henry W. Kingsbury, duly executed and valid according to the laws of the State of Virginia; and respondent also admits that on the 9th day of May, 1870, the said paper purporting to be the last will and testament of Henry W. Kingsbury, deceased, was presented to the corporation court
505 of the city of Alexandria, in the State of Virginia, and the same was by such court admitted to probate and ordered to be recorded as the true last will and testament of the said Henry W. Kingsbury, and on the 10th day of May, 1870, Ambrose E. Burnside, named as one of the executors of said will, qualified as such and entered upon the discharge of his duties.

And this respondent, further answering, denies the statement of the bill that said court in the State of Virginia had no jurisdiction to allow the probate of said will or the same to be recorded in the manner and form as the same was done, and denies that the probate and

record are void and of no effect, but she admits that neither she nor Eva Lawrence, nor Albert G. Lawrence, nor John McLean Taylor had no notice of the said application to and the proceedings in the said court in the State of Virginia.

And this respondent admits that on the 11th day of July, 1870, the said Ambrose E. Burnside presented to the county court of Cook county, in the State of Illinois, a petition, as set forth in the bill of complaint, and that an order was entered by said court, as alleged in the bill, and she also admits that such proceeding was had
506 without notice to her, or to complainant, or to Eva Lawrence, or Albert G. Lawrence, or John McLean Taylor.

And this respondent, further answering said bill, denies that said will was invalid or is ineffectual or null and void, as alleged in the bill of complaint; but, as advised by counsel, she alleges that the said will was written and executed in the manner required by the laws of the State of Virginia, where the same was made and proven, and that said will has been duly admitted to probate in the manner prescribed by the laws of Virginia and by a court of competent jurisdiction and having jurisdiction of the proceeding in which such probate was made, and that a duly certified copy of the will and probate thereof, according to the laws of the State of Illinois, was presented to the county court of Cook county, in the State of Illinois, as stated in the bill of complaint, and thereby the said will became good and available in the State of Illinois in like manner as wills made and executed in that State and according to the laws of that State.

And this respondent avers that an appeal was taken by the
507 complainant from the said order of the county court to this court, and the same is now pending and undertermined upon the law side of this court.

And as to all other matters and things in the said bill of complaint contained necessary and material to be answered unto by this respondent, not herein confessed or avoided or denied, this respondent denies the same, as stated in the bill.

And now, having fully answered, the respondent prays to be dismissed hence with her reasonable costs in this behalf sustained, etc.

JANE C. KINGSBURY,
By GOUNDY & CHANDLER,
Her Solicitors.

GOUDY & CHANDLER,
Sol'rs for said Def't, Jane C. Kingsbury.
JAMES E. MONROE, *Of Counsel.*

And afterwards, to wit, on the 6th day of December, A. D. 1870, Ambrose E. Burnside and John J. D. Kingsbury, by Goudy & Chandler, their solicitors, filed in said court their certain joint and several answer in the words and figures following, to wit:

STATE OF ILLINOIS, } ss:
Cook County, }

Circuit Court of Cook County. November Term, 1870.

508 HENRY W. KINGSBURY, by His Next Friend, CORYDON BUCKWITH, *vs.* AMBROSE E. BURNSIDE. } In Chancery.

The joint and several answer of Ambrose E. Burnside and John J. D. Kingsbury to the bill of complaint of Henry W. Kingsbury, a minor, who sues by his next friend, Corydon Beckwith, against Ambrose E. Burnside, Jane C. Kingsbury, Mary J. Buckner, Simon B. Buckner, John J. D. Kingsbury, Eva Lawrence, and Albert G. Lawrence.

These respondents, saving and reserving to themselves all benefit of exception to the many uncertainties and manifest insufficiencies in the said bill of complaint contained, protesting that the same and the matters and things therein contained are not sufficient to require any answer thereunto by these defendants, and praying the same advantage on the final hearing thereof as if they severally demurred to the said bill of complaint, for answer thereunto, or so much thereof as they are advised is material or necessary *or material* to
509 be answered unto by these respondents, they admit that on or about the 26th day of June, A. D. 1856, Julius J. B. Kingsbury died intestate and seized in fee simple, subject to certain incumbrances, of real estate situate in the city of Chicago, county of Cook and State of Illinois, described as—

Lots numbered five (5) and six (6), in block thirty-five (35), in the original town of Chicago, and also a part of the east half (½) of the northwest quarter of section nine (9), in township thirty-nine (39) north, of range fourteen (14) east, of the third principal meridian, which lies east of the North Branch of the Chicago river and north of Kinzie street, mentioned in the deed to the said Julius J. B. Kingsbury as containing about thirty-five (35) acres of land, and commonly known as the "Kingsbury tract."

And these respondents admit that the said Julius J. B. Kingsbury left surviving him Jane C. Kingsbury, his widow, and two children—Mary K. Buckner and Henry W. Kingsbury; and they aver that the title of the said real estate, as the same was vested in the said Julius J. B. Kingsbury, descended to and vested in the respondent, Mary K. Buckner, and the said Henry W. Kingsbury, subject
510 to the right of dower of the widow, Jane C. Kingsbury, and Mary K. Buckner, being then the wife of the respondent, Simon B. Buckner, and, there being issue born of such marriage in the year 1858, an estate as tenant by the curtesy initiate to an undivided half of said real estate, subject to such dower estate, also vested in the said Simon B. Buckner.

And these respondents admit that on the 4th day of December,

1861, the said Henry W. Kingsbury, the father of the complainant, intermarried with Eva Taylor, and that on or about the 17th day of September, 1862, the said Henry W. Kingsbury was killed at the battle of Antietam, in the State of Maryland, and that at the time he was colonel in the volunteer service, commanding a regiment of Connecticut Volunteers, engaged in the military service of the United States; that said Henry W. Kingsbury at his death left surviving him his widow, who is still living, and that afterwards, on the 16th day of December, 1862, there was born to him by his said widow a posthumous son, who is the complainant in this suit.

And these respondents, further answering the said bill of
511 complaint, deny that the said Henry W. Kingsbury, the father of the complainant, died intestate and seized in fee simple as the absolute owner thereof — all the real estate described in said bill of complaint.

And the respondents admit that the said Eva Kingsbury, on the 26th day of September, 1865, intermarried with one Albert G. Lawrence, and that she is now his wife.

The- admit that the said Jane C. Kingsbury, on the 8th day of October, 1868, filed her bill of complaint in the circuit court of Cook county, in the State of Illinois, against the said Eva Lawrence, Albert G. Lawrence, the said complainant, and one David J. Lake, who was then acting as guardian of the complainant; that the said Eva Lawrence and Albert G. Lawrence, on the 9th day of October, 1868, filed their cross-bill in the said cause and in the said court against the said Jane C. Kingsbury, the said complainant, and the said David J. Lake, and as to the contents of said bills these respondents refer to the same as they appear upon the files of this court.

And these respondents admit that on the — day of ——, 1869, the said complainant, by his next friend, Evaline A. Taylor, filed
512 his cross-bill in said cause against said Jane C. Kingsbury, Eva Lawrence, Albert G. Lawrence, and the said David J. Lake, and as to the contents of said cross-bill these respondents refer to the same as the same now appears upon the files of this court, and they neither admit nor deny the allegations of the bill in regard to the contents of any or either of said bills.

And these respondents, further answering the bill of complaint, admit that the said Henry W. Kingsbury, the father of the complainant, in his lifetime, on the 25 day of March, 1862, at Fortress Monroe, in the State of Virginia, wrote with his own hand and signed a paper, of which "Exhibit A" attached to the bill is a correct copy, and that he then and there delivered the same to John McLean Taylor for safe keeping, but they deny the allegation of the bill that he was not at the time of the execution of said paper an inhabitant or resident of said State of Virginia, and that he was not such an inhabitant or resident thereafter nor at the time of his death, and that he had no property of any kind whatever in said State of Virginia at the time of his death nor for a long
513 time prior thereto; but, on the contrary, these respondents

aver, upon information and belief, that at the time of the execution of said paper the said Henry W. Kingsbury was an inhabitant of the State of Virginia, and that he had property of some description in said State of Virginia at the time of his death and for some time prior thereto.

And these respondents admit that on the 9th day of May, 1870, the said paper purporting to be the last will and testament of said Henry W. Kingsbury was presented to the corporation court of the city of Alexandria, in the State of Virginia, and such proceedings were thereupon had that the said court ordered the said writing to be recorded as the true last will and testament of the said Henry W. Kingsbury, and that on the 10th day of May, 1870, the respondent, Ambrose E. Burnside, named in the said paper as one of the executors, qualified as such executor.

These respondents, further answering the bill of complaint, deny the allegation of the bill that the said court had no jurisdiction to allow the probate of said will or the same to be recorded
514 in manner and form as the same was done; that such probate and record was utterly void and of no effect against the complainant, and they admit that neither the complainant, Jane C. Kingsbury, Eva Lawrence, Albert G. Lawrence, or John McLean Taylor had any notice of the said application to the said court in the State of Virginia.

But these respondents, further answering said bill, aver that the said corporation court in the city of Alexandria, in the State of Virginia, had at the time of the said proceedings jurisdiction to admit wills to probate according to the statutes of the State of Virginia in such case made and provided; that at the time of such proceedings and before there was estate of the said Henry W. Kingsbury, deceased, in the city of Alexandria, in the State of Virginia; that it was competent for the said court to determine whether a cause sufficient to justify and invoke its action was presented, and that the said court did then and there determine that it had jurisdiction of said proceeding and the right to admit the said will to pro-
515 bate, and that, such proceedings being had by a court of competent jurisdiction, its action is conclusive upon all persons whatever; and they aver that the said proceedings were in all respects in conformity to the laws of the State of Virginia and the rules of said court.

And these respondents, further answering said bill, admit that on the 11th day of July, 1870, the respondent, Ambrose E. Burnside, by his counsel, presented to the county court of Cook county, in the State of Illinois, a petition, together with a certified copy of said will and the probate thereof, according to the statute of the State of Illinois, and asked that the same be recorded in the manner directed by said statute, so as to be good and available in the State of Illinois — manner as in the State of Virginia, and that such proceedings were thereupon had that the said court of Cook county on the same day ordered that the same paper and proof be recorded in the said court, and that the same be treated and considered as good and availa-

ble in law in like manner as a will executed in the State of Illinois.

516 And these respondents admit that such proceedings were had without notice to the said complainant, to the said Jane C. Kingsbury, Eva Lawrence, Albert G. Lawrence, or John McLean Taylor.

And these respondents admit that after making the said will and testament the complainant was born, and that no provision was made in said will for him, and they aver that by the laws of the State of Virginia, where such will was made and proven, such posthumous birth did not revoke said will, but required the will to be so construed that it should read as if the devises and bequests therein had been limited to take effect in the event that the child shall die under the age of twenty-one years unmarried and without issue.

And, as to the effect of such posthumous birth on the title of the real estate in Illinois, these respondents are advised that the same is a question of law, and they submit the same to the decision of this court.

And these respondents deny that said will was not executed with the forms and solemnities to make the same good and available in law and for granting and conveying lands, tenements, hereditaments, moneys, goods, and chattels, as stated in said bill of complaint; but, on the contrary, they aver that the same was written, executed, published, and proved in all respects according to the laws of the State of Virginia, and that the corporation court of the city of Alexandria, in said State, had full jurisdiction to decide the question submitted to it and to admit the said will to probate, and that according to the provisions of the statute of Illinois the same, being certified as required by the said statute and recorded in the said county of Cook, became good and available in law in like manner as wills made and executed in the State of Illinois.

517

And this respondent, Ambrose E. Burnside, avers that before the death of the said Henry W. Kingsbury he had had the management of the estate of his father, Julius J. B. Kingsbury, for a long time; that he was the intimate friend and acquaintance of the said Henry W. Kingsbury, and that a short time before his death the said Henry W. Kingsbury made a special request of this respondent that he would look after his affairs and see that his wishes in regard to his business were carried out, and, being named in the said will as one of his executors, this respondent has felt it to be his duty to present the said will for probate and ask that its provisions should be enforced by the courts, and he avers that he was not desired [desirous] to interfere with the rights or property of the said complainant, but simply discharge his duty under the will and to obey the last directions of the deceased.

518

And these respondents deny all fraud and combination charged in the bill, and they also deny all other matters and things in the said bill of complaint contained which are material and necessary to be answered unto by them or either of them.

And now, having fully answered said bill of complaint, they pray to be hence dismissed with their reasonable costs, etc.

AMBROSE E. BURNSIDE,
By GOUDY & CHANDLER,
His Solicitors.
JOHN J. D. KINGSBURY,
By GOUDY & CHANDLER,
His Solicitor-.

GOUDY & CHANDLER, *Solicitors, etc.*

And afterwards, to wit, on the 24th day of December, A. D. 1870, Henry W. Kingsbury, by Beckwith, Ayer & Kales, filed in said
519 court his certain replication in the words and figures following, to wit:

STATE OF ILLINOIS, } *ss:*
Cook County, }

In the Circuit Court of Cook County, of the December Term, 1870.
In Chancery.

The replication of Henry W. Kingsbury, a minor, by Corydon Beckwith, his next friend, complainant, to the answer of the said defendant.

The repliant, saving and reserving to himself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the said defendants, for replication thereunto saith that he does and will aver, maintain, and prove said bill to be true, certain, and sufficient in the law to be answered unto by the said defendants, and that the answers of the said defendants are very uncertain, evasive, and insufficient in the law to be replied unto by this repliant, without this, that any other matter or thing in the said answer contained material or effectual in the law to be replied
520 unto and not herein and hereby well and sufficiently replied unto, confessed or avoids [avoided], traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by his said bill he has already prayed.

BECKWITH, AYER & KALES,
Solicitors for Complainants.

And afterwards, to wit, on the 31st day of October, A. D. 1870, Mary K. Buckner and Simon B. Buckner, by Goudy and Chandler, their solicitors, filed in said court their certain cross-bill in the words and figures following, to wit:

STATE OF ILLINOIS, } ss:
Cook County, }

Circuit Court. October Term, 1870.

MARY K. BUCKNER and SIMON BUCKNER
vs.
HENRY W. KINGSBURY, EVA LAWRENCE, ALBERT G. LAWRENCE, JANE C. K. KINGSBURY. } In Chancery.

Cross-Bill.

To the circuit court of Cook county, in the State of Illinois:

521 Your orator-, Mary K. Buckner and Simon B. Buckner, of the county of Jefferson and State of Kentucky, unto your honors humbly complaining, show that [on] in the — day of July, 1870, a certain bill of complaint was filed in the circuit court of Cook county, Illinois, by Henry W. Kingsbury, an infant under the age of twenty-one years, by Corydon Beckwith, his next friend, against Ambrose E. Burnside, Jane C. Kingsbury, Mary K. Buckner, Simon B. Buckner, John J. D. Kingsbury, Eva Lawrence, and Albert G. Lawrence, and in and by said bill it was alleged that on or about the 26th day of June, 1856, Julius J. B. Kingsbury departed this life intestate and seized of the following-described real estate situate in the city of Chicago, county of Cook, and State of Illinois, to wit:

Lots number- five and 6, in block 35, in the original town of Chicago, and also all that part of the east half of the northwest quarter of section nine, in township 39 north, of range 14 east, of the third principal meridian, which lies east of the North Branch of the Chicago river and south of the center of Ontario street, excepting, however, a small portion of the said last-described tract, which the

522 said decedent had previously conveyed to Simon B. Buckner, the title to which portion remained in said Buckner until on or about the 15th day of May, 1861, when the same was conveyed by said Buckner and wife to Henry W. Kingsbury, the father of the complainant; that the said Julius J. B. Kingsbury left surviving him his widow, Jane C. Kingsbury, who was still living, and two children, Mary K. Buckner, the wife of the said Simon B. Buckner, and Henry W. Kingsbury, the father of the complainant, who were his only heirs-at-law; that on or about the fifteenth day of May, 1861, the said Simon B. Buckner and Mary K. Buckner, his wife, by their deed of that date, duly executed and acknowledged, granted, bargained, sold, and conveyed to the said Henry W. Kingsbury, the father of the complainant, one undivided half of lots 5 and 6, in block number 35, in the original town of Chicago above described, and also all their right, title, and interest in and to the other tract of land above described, situate in the northwest quarter of section 9, township 39 north, of range 14 east, of the third principal me-

523 ridian; that afterwards, on or about the 4th day of December, 1861, the said Henry W. Kingsbury, the father of the complainant, intermarried with Eva Taylor, he being at that time a citizen and

resident of Connecticut; that on or about the 17th day of December, 1862, the said Henry W. Kingsbury, the father of the complainant, was killed at the battle of Antietam, in the State of Maryland, he being at that time a citizen and resident of the State of Connecticut and colonel and commanding officer of a regiment of Connecticut volunteers engaged in the military service of the United States; that the said Henry W. Kingsbury at his death left surviving him his widow, Eva Kingsbury, the mother of the complainant, who is still living, and afterwards, on the 16th day of December, 1862, there was born to him by his said widow a posthumous son, who was the complainant in said bill and the only heir-at-law of the said Henry W. Kingsbury, deceased; that the said Henry W. Kingsbury died intestate and seized in fee simple of all the real estate therein described, and the complainant held all of the real estate by inheritance from his said father, subject to the dower estate of his mother and Jane C. Kingsbury, the widow of Julius J.
524 B. Kingsbury, and also subject to certain incumbrances outstanding against the said property or some portions thereof; that the said Eva Kingsbury, on the 26th day of September, 1865, intermarried with one Albert G Lawrence, and that she was then his wife; that the said Jane C. Kingsbury, on the 8th day of October, 1868, filed her bill of complaint in the circuit court of Cook county, in the State of Illinois, against the said Eva Lawrence, Albert G. Lawrence, the complainant, and David J. Lake, who assumed to act as guardian of the complainant, and praying that her dower might be assigned to her and making the said bill a part of the bill of complaint; that the said Eva Lawrence and Albert G. Lawrence, on the 9th day of October, 1868, filed their cross-bill in the said said court and in the said cause against the said Jane C. Kingsbury, the complainant, and said David J. Lake, praying that her dower in said premises might be assigned to her and making said cross-bill a part of the said bill of complaint; on the — day of ——, 1869, the complainant, by his next friend, Evaline A. Taylor, filed his cross-bill in the said cause against said Jane C.
525 Kingsbury, Eva Lawrence, Albert G. Lawrence, and the said David J. Lake, praying for the removal of the said David J. Lake from his guardianship and for the appointment of a receiver of the income, rents, and profits of the said premises and to manage and lease the same and making the said cross-bill a part of said bill of complaint; that afterwards such proceedings were had in said causes and cross-causes that it was decreed that the said Jane C. Kingsbury was entitled to dower in said premises, and by reason thereof she was entitled to one-third of the rents and profits of the same, less one-third of the interest due upon certain mortgages in said decree mentioned, and that said Eva Lawrence was entitled to dower in two-thirds of said premises, by reason whereof she was entitled to two-ninths of the income of said premises, less two-ninths of the interest upon certain mortgages in said decree mentioned, and that the complainant was entitled to the residue of the income of said premises after *the* paying her portion of the interest upon said mortgages, and that in and by said decree John Wood-

bridge was appointed receiver, with power to lease and manage
526 the said real estate under the direction of the court and to receive the income thereof, and with directions to pay out of said income to Jane C. Kingsbury and Eva Lawrence the sums to which they were, respectfully [respectively] entitled, and providing for the complainant's support and maintenance, as well as for the payment of the interest upon said mortgages and other expenses incident to the care and management of said property, and making the record of said proceedings a part of said bill of complaint; that the said John Woodbridge accepted the office of and was duly qualified as said receiver and entered upon his duties as such, and that he hath from thence hitherto been and still is such receiver as aforesaid; that the complainant was informed and believed that the said Henry W. Kingsbury, his father, on the 25th day of March, 1862, at Fortress Monroe, in the State of Virginia, did write in his own hand and sign a paper, of which "Exhibit A," attached to said bill or [of] complaint, was a correct copy, and that he then and there delivered the same to John McLean Taylor, therein named, for
527 safe-keeping, and that his father was not at — time of the execution of said paper an inhabitant or resident of the State of Virginia and that he was not such inhabitant or resident at any time thereafter nor at any [the] time of his death, and that he had no property of any kind whatever in the said State of Virginia at the time of his death nor for a long time prior thereto; that he is advised and believed that on the 9th day of May, 1870, the said paper purporting to be the last will and testament of Henry W. Kingsbury was presented to the corporation court of the city of Alexandria, in the State of Virginia, and such proceedings were thereupon had as that the said court ordered the said writing to be recorded as the true last will and testament of Henry W. Kingsbury, father of the complainant, and that on the 10th day of May, 1870, Ambrose E. Burnside, named in said paper as one of the executors, assumed to qualify as such, as by a copy of the proceedings of the said court annexed to said bill of complaint would more fully appear, and making the same a part of said bill; that the said court in the State of Virginia had no jurisdiction to allow the probate of said
528 will or the same to be recorded in the manner and form as the same was done, and that said probate and record are utterly void and of no effect against the complainant, and that neither the complainant nor the said Jane C. Kingsbury, Eva Lawrence, Albert G. Lawrence, or John McLean Taylor had any notice of the said application and of the proceedings in the said court in the State of Virginia; that on the 11th day of July, 1870, the said Ambrose E. Burnside presented to the county court of Cook county, in the State of Illinois, a petition in writing setting forth that said Henry W. Kingsbury, the father of the complainant, departed this life at Maryland, leaving a last will and testament, duly signed in the State of Virginia, which had been duly proved in said State, a certified copy of which he presented to said court for record, and praying that letters testamentary might be granted to him as one of the executors of the said will;

that such proceedings were thereupon had at the said county court of Cook county, on the 11th day of July, 1870, that it was or-
529 dered by said court that the said papers and proof thereof be recorded in said court, and that the same be treated and considered as good and available in law in like manner as a will executed in this State; that the said proceedings in the said county court of Cook county were had without notice to your orators or to the said Jane C. Kingsbury, Eva Lawrence, Albert G. Lawrence, or John McLean Taylor, and that such proceedings ought to be held and adjudged of no force and effect as to the complainant's rights, and that such proceedings cloud the title and rights of the complainant, and —, unless restrained, seriously embar-ass the administration of his property by the officer of the said court; that after the making of the said paper called the last will and testament of the father of the complainant the complainant was born, and that no provision was made in the said paper for your orator, and that it does not appear by said paper that it was the intention of the complainant's father to disinherit him, and that by reason of these facts, even if the said — was a valid will, the complainant
530 would be entitled to receive out of the estate of his father the same as if he had died intestate, and that, being the sole and only heir of his father, he inherits the whole of his father's estate, subject to the dower of his mother and to the other incumbrances thereon; that the said paper so produced as the last will of the said Henry W. Kingsbury, the father of the complainant, was not signed by him in the presence of any attesting witness, nor was the same attested in the presence of the said Henry W. Kingsbury by any witness, and the complainant alleges that the said writing was not executed with the requisite forms and solemnities to make the same good and available in law for the granting, conveying, and assuring the lands, tenaments, hereditaments, moneys, goods, — chattels therein and thereby supposed to be given, granted, and bequeathed, and the complainant contests the validity of the said instrument and insists that the proceedings of the county court of Cook county ought to be reversed and set aside.

And in and by said bill of complaint — had hoped that
531 no dispute would have arisen touching the rights of the complainant in the premises, but that the said Ambrose E. Burnside, combining and confederating with the other defendants thereinafter named or some of them, alleged and pretended that the said instrument was executed with all the formalties required by the laws of the State of Virginia relating to the execution of wills, and that since the said instrument was written and signed by the said Henry W. Kingsbury in this State it is entitled to probate in the State of Illinois, and is good and available in law in this State in like manner as wills made and executed here according to the forms and solemnities required by the laws of Illinois, and charged the contrary, and that the said Henry W. Kingsbury, deceased, was never a citizen of the State of Virginia, nor was he ever domiciled in that State, but at the time of making said instrument he was and ever after continued to be a citizen and resident of the

State of Connecticut; that he did not die in the State of Virginia, and was seized of no estate, either personal or real, in that State
532 at the time of his death; that the said instrument was ineffectual to operate as a valid will according to the laws either of the place of his domicile or of the State of Maryland, where he died, or either of the States where any portion of his property, either real or personal, was legally situated, for want of the requisite forms and solemnities to give the same effect; and the complainant submitted that under the facts and circumstances the instrument aforesaid is not entitled to probate by the laws of the State of Illinois, and in and by said bill of complaint it was stated that Jane C. Kingsbury, Mary K. Buckner, the wife of Simon B. Buckner, and John J. D. Kingsbury, and Eva Lawrence, the wife of Albert G. Lawrence, were named in said instrument as devisees or legatees, and that they or some one or some of them claim thereunder some interest in the title of the complain-t, whereas the complainant charges that they had not nor had either of them acquired any interest in the said estate by virtue thereof.

And in and by said bill the complainant prayed that the defendants might answer the matters stated in the bill of complaint without oath, and that the instrument therein referred to purporting to be
533 the last will and testament of the said Henry W. Kingsbury, deceased, might be declared invalid and of no legal force or effect, and that the proceedings of the county court of Cook county admitting the said instrument to record and directing that the same be treated as good and available in law in like manner as wills executed in this State might be reversed and set aside or declared to be null and void as constituting a cloud upon the complainant's title to the real estate therein described, and that the complainant's right and title by inheritance to the estate described in said bill as the posthumous son and only heir-at-law of the said Henry W. Kingsbury, deceased, might be confirmed and established, and also praying for a temporary injunction against the said Ambrose E. Burnside restraining him from interfering with the real estate claimed by the complainant, or with the rents, issues, or profits thereof, and from attempting to interfere with the said John Woodbridge in the performance of his duties as receiver, and that on the final hearing of the cause the injunction might be made perpetual, and for general relief.

534 And your orators further show unto your honors that on the 1st day of November, 1870, they filed their joint and several answers to the said bill of complaint of Henry W. Kingsbury, a minor, who sued by his next friend, Corydon Beckwith, against Ambrose E. Burnside and others, and in and by said answer, after the usual protesting clause, your orators admitted the death of Julius J. B. Kingsbury intestate and seized of certain real estate described in said bill of complaint, and averring that he was also seized of other real estate described in the answer; that he left surviving Jane C. Kingsbury, his widow, and two children—your orator, Mary K. Buckner, and Henry W. Kingsbury, deceased; and your orator in said answer averred that the title of said real estate, as the same was vested in Julius J. B. Kingsbury, described [descended] to and vested in your orator,

Mary K. Buckner, and the said Henry W. Kingsbury, subject to the right of dower of the widow, Jane C. Kingsbury, and that — your orator, Mary K. Buckner, being then the wife of your orator, Simon B. Buckner, and, there being issued living born of such marriage
535 in the year 1858, a life estate as tenant, by courtesy, in-it-ate, to an undivided half of the said real estate, subject to such dower estate, also vested in the said Simon B. Buckner; that at the time of the death of the said Julius J. B. Kingsbury the said Henry W. Kingsbury was a minor, and the respondent, Simon B. Buckner, had the control and management of said property until it was placed in the hands of Ambrose E. Burnside, as stated in said answer.

And your orators in said answer admitted that the deed dated May 15th, 1861, signed, sealed, and acknowledged as appeared therefrom, purporting to convey to the said Henry W. Kingsbury, deceased, an undivided half of the real estate described in the answer, was signed and acknowledged in manner shown by said deed, and they attached a copy thereof, marked "Exhibit 1," as part of their answer, by which they expressly denied that it granted, bargained, sold, and conveyed the title to said real estate, as alleged in the bill of complaint; but, on the contrary, your orator, Mary K. Buckner, averred that, as she was advised, the said indenture was not acknowl-
536 edged according to the laws of the State of Illinois in such manner as to part [pass] her title to said property to the grantee, and therefore she averred that said deed was null and void as to her.

And your orator- in said answer averred that said deed was prepared, signed, and acknowledged on the day of its date in the city of Louisville, in the State of Kentucky, where they then resided; that the said Henry W. Kingsbury was not present at the time and had no information or knowledge whatever that such instrument of writing was to be made or was being made, and that such deed was then sent by your orator, Simon B. Buckner, to his agent in Chicago, with directions to file the same for record, which was done on the 17th of May, 1861, and which was the only delivery of such deed ever made to the said Henry W. Kingsbury, and that the said Henry W. Kingsbury had no information or knowledge whatever that any such deed had been made or recorded until two months thereafter; and they averred that the same was so made without any consideration, contract, bargain, or promise what-
537 ever; and they aver that, while the said Henry W. Kingsbury was ignorant in regard to said transaction, the sole purpose of the respondents in making said deed was to vest in the said Henry W. Kingsbury the legal title to the property described in said deed or indenture, to hold the same in trust, and not to create in him any beneficial interest whatever; that they, having full confidence in the affection and integrity of the said Henry W. Kingsbury, voluntarily made such deed in the manner aforesaid, believing that he would not claim the rents and profits and would convey or reconvey the premises on request; and your orator, Simon B. Buckner, for himself, said that it was his own purpose and desire to waive any interest or claim in said property for

the benefit of his wife in order that she might have and enjoy all the property descended from her father and that the control of the same might be placed in her own family, and — which he, by his answer, claimed all his rights in equity, and under the law it was still with the desire and purpose effectually to divest himself in some legal
538 and appropriate manner of all claims to said property, and he, in said answer, offered to submit to any decree the court might deem proper to that end; and your orator, in said answer, averred that the said Henry W. Kingsbury, frequently after he was informed of the facts and at all times during his lifetime, admitted that he held the title to said property described in the deed of May 15th, 1861, in trust, and that he had no right or ownership for himself whatever, and express their confident belief that the said Henry W. Kingsbury would have recognized the equitable and just claim of your orators, and that if he had lived this controversy would never have arisen; that the said Henry W. Kingsbury during his lifetime made no claim to the rents and profits of said real estate described in the deed of May 15th, 1861; that the same were received and controlled, as before said deed was made, by an agent, Ambrose E. Burnside, acting for Mrs. J. C. Kingsbury, Henry W. Kingsbury, and your orator, and applied for the benefit
539 of all of them the same as if no such deed had been made, and that possession was never taken or entry made under said deed by the said Henry W. Kingsbury or any other person.

And in and by said answer your orator further averred that, on the 25th day of March, 1862, at Fortress Monroe, in the State of Virginia, the said Henry W. Kingsbury, who was then first lieutenant in the fifth regiment of artillery in the United States Army, wrote with his own hand and signed his last will and testament, and giving a true copy of the same in said answer.

And your orator- averred that the only property in Chicago vested in the said Henry W. Kingsbury at the time of making the said will or at any other time was the real estate which the said Julius J. B. Kingsbury left at his death, and which descended to the said Henry W. Kingsbury and the respondent, Mary K. Buckner, subject to the right of dower of Jane C. Kingsbury; and they also averred that the only transfer, grant, conveyance, or devise of property in Chicago ever made to the said Henry W. Kingsbury was made by the said deed or indenture of the 15th day of
540 May, 1861, thereinbefore described, and that the only Chicago property held in the name of Henry W. Kingsbury for the use of any person was the property described in the deed of May 15th, 1861, and was held in trust.

And in and by said answer your orators admitted that the said Henry W. Kingsbury, at the time mentioned in the bill *bill*, intermarried with Eva Taylor; that he was killed at the battle of Antietam at the time named, and left surviving him his widow, and, after his death a posthumous son was born, as stated in the bill, and became his heir-at-law and was the complainant in the said suit.

And they admitted that Henry W. Kingsbury died seized of an undivided half of the real estate described from said Julius J. B.

Kingsbury, but denied that he was the real owner of more than one undivided half thereof, subject to the right of dower of the said Jane C. Kingsbury and certain incumbrances thereon, and denied that he died intestate; and they admitted that Eva Kingsbury married one Albert G. Lawrence at the time stated in the bill,
541 and that she was his wife.

And they admitted that Jane C. Kingsbury filed her bill in chancery against Eva Lawrence and others, as stated in the bill of complaint, and that Eva Lawrence and Albert G. Lawrence filed a cross-bill in said cause against J. C. Kingsbury and others, as alleged in the bill of complaint, and that the complainant, by his next friend, filed a cross-bill in said cause against Jane C. Kingsbury and others, as stated in the bill, and also that John Woodbridge was appointed receiver, but neither admitting -or denying the statements of the bill in regard to the proceedings in said cause or as to the contents of said bill.

And in and by said answer your orators admitted that on the 25th day of March, 1862, said Henry W. Kingsbury, at Fortress Monroe, in the State of Virginia, wrote with his own hand and signed a paper, of which "Exhibit A" attached to the bill of complaint was a true copy, and that he left the same at some place or with some person to them unknown; but they denied the statement of the bill that the father of the complainant was not at the time of the execution of the said paper an inhabitant or resident
542 of Virginia, and that he was not such resident and inhabitant thereafter; and they also denied the statements of the bill that he had no property of any kind in the State of Virginia at the time of his death nor for a long time prior thereto; but, on the contrary, they averred that the said Henry W. Kingsbury was an inhabitant of the State of Virginia, and that he had property in said State, and at the time the paper was proven as the last will and testament of the said Henry W. Kingsbury he had estate in the State of Virginia.

And they admitted that on the 9th day of May, 1870, said paper, a copy of which is given as "Exhibit A," was presented to the corporation court of the city of Alexandria, in the State of Virginia, and such proceedings were thereupon had that the court admitted the said paper to record as the last will and testament of the said Henry W. Kingsbury, and that the said Ambrose E. Burnside, named as one of the executors, qualified as an executor.

And they averred in and by said answer that the paper was the last will and testament of the said Henry W. Kingsbury,
543 that the said court had jurisdiction of such proceedings, and that the order and judgment of said court is conclusive of the question decided by it, and thereby the said last will and testament was admitted to probate, so that the same could not be questioned in any other proceeding.

And they admitted that on the 11th day of July, 1870, the defendant, Ambrose E. Burnside, presented a petition to the county court of Cook county, in the State of Illinois, together with a duly certified copy of said last will and testament of Henry W. Kingsbury, deceased,

and the probate thereof, as required by the statutes of Illinois in such case made and provided, and such proceedings were thereupon had that an order was entered admitting the same to record in said court, as would [will] more fully appear by the certified copy thereof which will be produced on the final hearing; and your orators in said answer averred that within twenty days after the entry of said order the complainant prayed an appeal from said order to the circuit court of Cook county, Illinois, which was allowed, and such appeal was then pending and undetermined in said court.

544 And in and by said answer your orators admitted that the complainant was born after the death of his father; that there is no provision for him in said will; and they averred that by the laws of the State of Virginia, where said will was made and proven, such posthumous birth did not revoke said will or any part thereof, but required the will to be so construed that it should read as if the devises and requests therein had been limited to take effect in the event that the child shall die under the age of twenty-one years unmarried, without issue; and, as to the effect of such posthumous birth on the title to real estate in Illinois, your orator stated that they were advised that the same was a question of law arising on the admitted facts, and they submitted the same to the decision of the court, but they expressed the hope and belief that the judgment of the court would give to the complainant all of the real estate which belonged to his father as if he had died intestate.

And they denied that said will was not executed with the forms and solemnity necessary to make the same good and avail-

545 able in law for the granting and conveying of lands, tenements, hereditaments, moneys, goods, and chattels, as stated in the said bill of complaint; but, on the contrary, they averred that the same was written, executed, published, and proved in all respects according to the laws of the State of Virginia, where the same was made and proved and where the said testator had estates, and the corporation court of the city of Alexandria, in said State, had full jurisdiction to decide the question as to the validity of said will and to admit the same to probate, and was, in fact, done, and, according to the provisions of the statute of Illinois, the same being certified as required by said statute and recorded in the county of Cook aforesaid, became good and available in law in like manner as wills made and executed in the State of Illinois.

And in and — said answer your orator- denied that the said Henry W. Kingsbury, deceased, was a citizen, resident, or inhabitant of the State of Conne-ticut, as alleged in the bill; but they averred that Julius J. B. Kingsbury, the father of Henry W. Kingsbury,

546 was, at the time the latter was born and for a long time prior thereto, an officer in the United States Army and had no fixed residence or place of abode, and that the said Henry W. Kingsbury was appointed in his boyhood a cadet at West Point and credited to the congressional district embracing Brooklyn, New York; that he passed through the regular course at that institution and was appointed at lieutenant in the United States Army and entered upon active service and continued in the same until his

death, and they claimed that the said Henry W. Kingsbury never acquired a residence or citizenship, within the meaning of the law, in any particular State, although he was a citizen of the United States and in its service and an inhabitant of such place as he happened to be ordered to in the discharge of his official duties.

And your orator, humbly complaining to your honors, further show that on the 26th day of June, 1856, Julius J. B. Kingsbury died intestate and seized in fee simple, subject to certain incumbrances, of real estate situated in the city of Chicago, county of Cook, and State of Illinois, and described as follows, to wit:

547 Lots five and 6, in block 35, original town of Chicago, and also a certain tract of land described as follows in a deed dated May 30th, 1833, executed by James Kinzie and wife to said Julius J. B. Kingsbury and recorded May 31st, 1833, in Book A, page 139, in the Records of Deeds in Cook county, Illinois, to wit: Bounded as follows: From the southeast corner of the town of Waubansia, commencing at the southeast corner of lot one, in block one, in said town of Waubansia (James Kinzie's Addition to Chicago), adjoining Kinzie street, in the town of Chicago (as laid off by the commissioners of the Illinois and Michigan canal), at a stake at the said corner of said lot, on the southwest bank of the North Branch of the Chicago river, at or near the water's edge, continuing at about north seventy-eight — west along the said southwest bank of said river, varying in distance from the water's — in proportion to the distance of the east and the west lines dividing the lots, blocks, streets, and alleys of blocks 1, 2, and 3, in the said town of Waubansia (with the exception of lot 8, in block two (2), which was conveyed by said James Kinzie and

548 wife to Seth Johnson, which said lot extended eastwardly into the centre of the channel of the North Branch of the Chicago river) to the intersection of the west line of the said town of Waubansia; thence north and terminating in the Chicago river; thence from a stake ninety links from the corner, from which a poplar bears north seventy — east and a lynn bears south eighty-four degrees six-nineteen- chains and two links to a stake, from which a lynn bears north seventy-eight — thirty — west, and also bears north two — thirty — west; thence twenty-two chains and seventy-five links to a corner established by the commissioners of the Illinois and Michigan canal; thence 4.46 chains to the Chicago river (North Branch); thence 3.45 chains to the place of beginning, the same being one equal half of the remaining part of the east half of the northwest quarter of section nine, in township thirty-nine north, of range fourteen east, after taking therefrom the said town of Waubansia, and said half of said remaining part of said tract of land is supposed to contain thirty-five acres or near that quantity.

And which is otherwise described as all of the east half of the northwest quarter of section nine, in township thirty-nine

549 north, of range fourteen east, of the third principal meridian, east of the southwest bank of the North Branch of the Chicago river, and south of an addition to Chicago formerly known as Sedgwick's, and which is commonly known as the "Kingsbury tract."

And which real estate of which the said Julius J. B. Kingsbury died seized includes all of the land described in the original bill of complaint herein.

And the legal title to a part of said tract of land described as a strip along the east branch of the North Branch of the Chicago river seventy feet in width for the full length of the tract was vested in your orator, Simon B. Buckner, by a deed dated January 22d, 1855, executed by the said Julius J. B. Kingsbury, but the said Julius J. B. Kingsbury was at his death the real owner thereof and your orator had no beneficial interest therein.

And your orators further show that the said Julius J. B. Kingsbury left surviving him a widow, named Jane C. Kingsbury, and two children—your orator, Mary K. Buckner, intermarried with your other orator, Simon B. Buckner, and Henry W. Kingsbury, now deceased. .

And your orators show that the title to the real estate herein-
550 before described descended to and vested in your orators, Mary K. Buckner, and the said Henry W. Kingsbury, subject, however, to the widow's right of dower therein and to the incumbrances thereon.

And your orators also show that at the time of the death of the said Julius J. B. Kingsbury they were intermarried and afterwards, in the year 1858, had issue to such marriage, a daughter, who is now living; and your orator, Simon B. Buckner, became vested with a life estate as tenant by the curtsey initiate in the property which descended to and vested in his wife.

And your orators further show that at the time of the death of the said Julius J. B. Kingsbury the said Henry W. Kingsbury was a minor, and your orator, Simon B. Buckner, had the full control and management of all of the real estate which was left by the said Julius J. B. Kingsbury, and retained such control until it was placed in the management of Ambrose E. Burnside, some time in December, 1860.

And your orators, further complaining, show that on the 15th day of May, 1861, they signed, sealed, and acknowledged a certain
551 deed or indenture purporting to convey to the said Henry W. Kingsbury, now deceased, an undivided half of the following real estate, to wit: One undivided half of lots 5 and 6, in block 35, in the original town of Chicago, Cook county, Illinois, and also the right, title, and interest in the Kingsbury tract, so called, being the tract of 35 acres, more or less, purchased from James Kinzie by the late Julius J. B. Kingsbury, of the United States Army, as per deed of said Kinzie on record in the clerk's office of Cook county, Illinois, the said tract being the south half of what remained of the northwest quarter of section nine, in township 39, range 14, in said Cook county, Illinois, after deducting therefrom the town of Waubansia.

The other interest in said lands, tenements, &c., included in said deed belongs to said Henry W. Kingsbury, as one of the heirs of the late Major Julius J. B. Kingsbury, and the entire property being subject to the dower interest of Jane C. Kingsbury, as will more fully appear by reference to a copy of said deed and certificate of ac-

knowledgement filed herewith, marked "Exhibit A," and made a part of this bill of complaint; and said deed was by your
552 orator, Simon B. Buckner, sent to his agent, in the city of Chicago, with directions to file the same for record, and such deed was received by the agent and filed by him in the proper office for record on the 17th day of May, 1861.

And your orators further show that the value of the property described in the said deed was large, to wit, five hundred thousand dollars, and it was the only property owned or held by your orator, Mary K. Buckner, except an undivided half *half* of some real estate in Waterbury, Connecticut, of small value; and the said Henry W. Kingsbury was the owner of the other undivided half of the same property.

Your orators further show that the said deed, as they are advised, was not acknowledged in accordance with the laws of the State of Illinois providing the manner in which deeds should be acknowledged by married women, and therefore claim that such deed is null and void as to your orator, Mary K. Buckner.

And your orators unto your honors further show that the said Henry W. Kingsbury, now deceased, was not present when said
553 deed was executed by your orators; that he had no previous knowledge of the intention to execute the same, and that such deed was executed, acknowledged, and recorded without the said Henry W. Kingsbury having any information or knowledge whatever upon the subject, and that he remained ignorant that such deed had been so made for several weeks, when he was informed of the facts in the premises, and they aver that the deed was made without any consideration, contract, arrangement, bargain, or promise whatever, and while the said Henry W. Kingsbury was ignorant thereof, and the deed was made under the circumstances herein set forth, the sole purpose of your orators in executing the same was to vest the title of the property described in said deed in trust, and there was no purpose whatever on the part of either of your orators to make a gift of said property or any part thereof to the said Henry W. Kingsbury or to grant the same to him except as a naked trustee without any beneficial interest, and your orators, as advised
554 by council, claim that by the rules of equity a trust created by implication of law, or a resulting trust, arose for the use and benefit of your orators to the extent and according to their respective interests and title when such deed was made.

And your orator, Simon B. Buckner, for himself alone, shows unto your honors that it was his *his* intention to waive all claim of said property and to allow his wife the sole use and enjoyment thereof and to place the control of the same in her own family, and that such intention had existed for a long time; yet he now claims all his legal and equitable rights in the premises and asks that the trust created and arising as aforesaid may be enforced so as to enable him to carry into effect his unaccomplished intention, and he hereby offers to allow any decree your honors may see proper to render in this case to confer the sole control and benefit of said property on his wife, her heirs and assigns.

Your orators aver that they had full confidence in the affection and integrity of the said Henry W. Kingsbury and voluntarily made such deed in the manner aforesaid, believing that he would
555 permit them to receive the rents and profits and convey or reconvey the premises as he might be requested by your orators or either of them.

And your orators further show that in the month of December, 1860, the said Henry W. Kingsbury and your orator, Simon B. Buckner, for themselves, the said Jane C. Kingsbury, and your orator, Mary K. Buckner, made an arrangement with Ambrose E. Burnside, who then resided in Chicago, to — charge of — manage said property as the agent of all of said parties, because none of them could conveniently do so.

And your orator unto your honors further shows that the said Henry W. Kingsbury, deceased, after he was informed of the execution of said deed, frequently and at all times during his lifetime admitted that he held the title to said property described in the deed of May 15th, 1861, in trust, and that he had no right or interest therein except as a trustee aforesaid, and at the same time expressed an intention to declare said trust in his will or reconvey the same.

And your orators express their confident belief that the said Henry W. Kingsbury would always have recognized the equitable and
556 just claim of your orators, and would have reconveyed the same upon request if he had lived, and that no controver-y would have arisen in regard to this matter; and they further aver that the said Henry W. Kingsbury during his lifetime made no claim to the rents and profits of the real estate described in the deed of May 15th, 1861, but such rents and profits were received and controlled as before said deed was made — an agent acting for Mrs. Jane C. Kingsbury, Henry W. Kingsbury, and your orator, and applied for the benefit of all of them the same as if no such deed had been made; and they aver that the said Henry W. Kingsbury never exercised any acts of ownership or asserted any claim to said property inconsistent with the trust herein set forth.

And your orators unto your honors further show that on the 25th day of March, 1862, at Fortress Monroe, in the State of Virginia, the said Henry W. Kingsbury, who was then a first lieutenant in the fifth regiment of artillery in the United States Army and engaged in the military service of the United States in the civil
557 war then existing, wrote with his own hand and signed his last will and testament as follows, to wit:

"Expecting soon to start *start* upon a military expedition where death may overtake me, I leave this as a record of my wishes respecting the disposition of my property.

"To my mother, Jane C. Kingsbury, I leave twenty thousand dollars, or so much of my Chicago property as upon fair appr-isal may be valued at that amount.

"To my sister, Mary K. Buckner, I leave so much of the Chicago property held in my name as shall amount to one-third of the property in the city of Chicago, Ill., left by my father, Julius J. B. Kingsbury.

"To my cousin, J. D. Kingsbury, I leave my property in Waterbury, Connecticut, and, in addition thereto, five thousand dollars, which I trust he will expend in completing his education.

"The remainder of my property of every description I leave to my devoted wife, Eva. I desire, moreover, that the provisions of this will may be so carried out that the yearly income of my wife for her own personal support shall never be less than two thousand dollars ($2,000).

558 "As executors I name Gen. Ambrose E. Burnside, of Rhode Island; Capt. John Taylor, com. d'p't U. S. Army.

"Signed at Fortress Monroe March 25th, 1862,

"HENRY W. KINGSBURY,

"*1st L't 5th Reg't Artillery, U. S. Army.*"

And your orators aver and unto your honors show that the only property in Chicago vested in the said Henry W. Kingsbury at the time of making said will or at any other time was the real estate which the said Julius J. B. Kingsbury left at his death, and which descended to the said Henry W. Kingsbury and his sister, Mary K. Buckner, subject to the right of dower of Jane C. Kingsbury and to certain incumbrances thereon.

And they also aver that the only transfer, grant, conveyance, or devise of property in Chicago ever made to the said Henry W. Kingsbury was by the said deed or indenture of the 15th day of May, 1861, hereinbefore described, and therefore they aver that the only Chicago property held in the name of the said Henry W. Kingsbury for the use of any person whatever at the time of

559 making said will or at the time of his death was the property described in the — of May 15th, 1861, so held as aforesaid in trust for your orators.

And your orators aver that at the time of writing said will the said Henry W. Kingsbury was only twenty-three years of age, had just left West Point, was without any business experience, and unacquainted with the rules of law; that said property had been used solely to receive the rents and profits, and Mrs. Jane C. Kingsbury, the said Henry W. Kingsbury, and your orator, Mary K. Buckner, had been treated as if each had been entitled to one-third, and, acting under the impression that his mother was the owner of one-third of said property in fee instead of for life, and your orator, Mary K. Buckner, was also the owner of one-third, the provision was written in the will of [for] your orator, Mary K. Buckner, with the purpose, on the part of said Henry W. Kingsbury, to declare said trust and to restore to the control of his sister all of the property which was described in the deed of May 15th, 1861, and therefore your orators claim that said will is sufficient

560 declaration in writing of said trust to take the same out of the statute of frauds if it was a trust within its provisions.

And your orators further show that said will of the said Henry W. Kingsbury was made and executed in conformity to the laws of the State of Virginia, and on the 9th day of May, 1870, the same was proved before and admitted to probate by the corporation court of

the city of Alexandria, in the State of Virginia, a court having jurisdiction under the laws of that State of the probate of wills, as the true last will and testament of the said Henry W. Kingsbury, said court also having jurisdiction then and there to receive proof and admit to probate said will; and afterwards, to wit, on the 11th day of July, 1870, a copy of said will and probate thereof, duly certified according to the laws of the State of Illinois in such cases made and provided, was presented to the county court of Cook county, in the State of Illinois, and by said court then and there ordered to be recorded and to be good and available in law in like manner
561 as wills made and executed in this State, and the same was recorded in accordance with said order.

And your orators further show that the said Henry W. Kingsbury, on the 23d day of October, 1861, wrote with his own hand a letter to his mother, Jane C. Kingsbury, and signed the same by his signature "Henry," in which, among other things, he wrote: "I spent all the morning with Burnside, yesterday. He stated, as I told you, that Simon had made over all the Chicago property that was held in his name to me. A new power of attorney is therefore necessary from you and myself. We made one out. I signed it. Burnside will send it to you." And they aver that the reference in said letter by the words "as I told you" was to a conversation between the said Henry W. Kingsbury and his mother had in their last personal interview before the date of said letter, in which the said Henry W. Kingsbury expressly admitted that he held all the property of your orator, Mary K. Buckner, inherited from her father in trust for a short time, and said that he would restore it all to her whenever she desired.

562 And your orators show that the only delivery of said deed bearing date May 15th, 1861, ever made was the filing of the same for record by the said Simon B. Buckner, as hereinbefore set forth.

And your orators unto your honors further show that on or about the 4th day of December, 1861, the said Henry W. Kingsbury, now deceased, married Eva Taylor, and on or about the 17th day of September, 1862, he was killed at the battle of Antietam, in the State of Maryland, and left surviving him his widow, Eva Kingsbury, and afterwards, on the 16th day of December, 1862, a posthumous son was born of the said widow, who was named after his father, Henry W. Kingsbury, and is the complainant in the original bill herein.

And your orators further show that the said Eva Kingsbury, on the 26th day of September, 1865, married one Albert G. Lawrence, and that they are now both living as husband and wife, and are defendants to the original bill herein.

And your orators unto your honors further show that the said Henry W. Kingsbury, the complainant in the original bill, his mother, Eva Lawrence, and her husband, Albert G. Law-
563 rence, resided in the State of Rhode Island, and, as your orators are informed, the said Eva Lawrence is acting as guardian of her son, Henry W. Kingsbury, by virtue of some ap-

pointment made in the District of Columbia, and that said Henry W. Kingsbury has no guardian of his person or property in the State of Illinois.

And your orators unto your honors further show that the said Henry W. Kingsbury, by his mother and guardian and her husband, now assert- and claim- that he, the said Henry W. Kingsbury, is the owner in fee simple of the property described in the deed of May 15th, 1861, made by your orators, and hereinbefore set forth, and derived an absolute title by inheritance from his father, and that he is entitled to all the rents and profits arising therefrom, subject only to the incumbrances which existed at the time of his father's death and to the right of dower of the said Jane C. Kingsbury, and also the right of dower of his mother, Eva Lawrence, and refuses to recognize the just and equitable claims of your orators or either of them.

564 And the said Henry W. Kingsbury, Jane C. Kingsbury, and Eva Lawrence are in the receipt of all the rents and profits arising from said premises after the payment of taxes and interest on the incumbrances thereon.

But now so it is, may it please your honors, that the said Henry W. Kingsbury, Eva Lawrence, and other persons to your orators unknown, combining and confederating together to injure your orators and each of them, refuse to acknowledge the right of your orators in and to the real estate hereinbefore described, and deny that the said deed of May 15th, 1861, hereinbefore set forth, was and is a deed of trust, and alleged that the same was an absolute deed of conveyance, made for a sufficient consideration, and that if the said deed was in fact a deed of trust that such trust is not evidenced by any writing, and therefore is void, according to the provisions of the statute of frauds and perjuries, and they pretend that the said Henry W. Kingsbury is now the owner in fee simple of the whole of said real estate, subject to the dower of the said Jane C. Kingsbury and Eva Lawrence and the mortgages thereon.

565 Whereas your orators charge the truth to be that the said deed bearing date May 15, 1861, was only a deed of trust; that such trust arises by the implication of law, and is not therefore within the terms of the statute of frauds and perjuries, and, if it is, that the same is evidenced by a sufficient writing; and that your orator, Mary K. Buckner, is in equity the owner of an undivided half of the property left by the said Julius J. B. Kingsbury, and hereinbefore described, subject to the right of dower of Mrs. Jane C. Kingsbury and certain mortgages thereon, and that they are entitled to the rents and profits and possession according to their respective interests.

All which actings and doings of the said Henry W. Kingsbury, Eva Lawrence, Albert G. Lawrence, and their confederates are contrary to equity and good conscience, and tend to the manifest wrong, injury, and oppression — your orator-.

In tender consideration whereof, and forasmuch as your orators are without remedy at law and can only be relieved in a court of equity, where matters of this sort are properly cognizable, to the end,

thereof [therefore], that the said Henry W. Kingsbury, Eva
566 Lawrence, Albert G. Lawrence, Jane C. Kingsbury, and their confederates may answer this bill of complaint (but not upon oath, that being expressly waived, in pursuance of the provision of the statute), and that as fully and particularly as if the same were here again repeated and they severally interrogated thereunto;

And that the said deed bearing date May 15th, 1861, purporting to be executed by your orators and made an exhibit to this cross-bill of complaint may be declared null and void as to your orator, Mary K. Buckner.

That the same may be declared a deed of trust to the said Henry W. Kingsbury, deceased, for the use and benefit of the grantors or one of them; that the said Henry W. Kingsbury, one of the defendants to this cross-bill of complaint, may be held and declared to hold the property described in said deed of May 15th, 1861, as a trustee in like manner, and that he be required by the decree of this honorable court to reconvey said property to your orators or one of them, as may be determined by the court; that an account may be taken of the receipts and disbursements from and about said property by the defendants, and such decree be
567 entered as equity may require in regard to such receipts and disbursements.

That the said Jane C. Kingsbury may have her right of dower ascertained and set off; that the said Eva Lawrence may have her dower fixed and assigned; that partition may be made of said real estate; that the property owned by your orators and hereinbefore described be restored to them as they may severally be entitled thereto, and that your orators may each have such other and further relief as shall be just and equitable—

Your orators pray that a rule may be entered requiring the said Eva Lawrence, Albert G. Lawrence, and Jane C. Kingsbury to answer, plead, or demur to this cross-bill of complaint within some reasonable time to be fixed by your honors, and that a guardian *ad litem* be appointed for the said Henry W. Kingsbury, and that such guardian be required to answer and defend for the said Henry W. Kingsbury, and that the said defendants and their confederates, when discovered and made parties, be required to stand to and abide such order and decree as may be entered in this cause during the course of such proceedings and upon a final hearing.

And your orators will ever pray, etc.

GOUDY & CHANDLER,
Solicitors for Complainants.

568 EXHIBIT A.

Be it known that Simon B. Buckner and Mary K. Buckner, his wife, of the city of Louisville and State of Kentucky, in consideration of the sum of one dollar in hand paid and the natural love and affection we bear to our brother, Henry W. Kingsbury, do hereby

grant, bargain, sell, and convey to said Henry W. Kingsbury, of the United States Army, his heirs and assigns forever, the following property, viz: One undivided half of lots number- five (5) and six (6), in block number thirty-five (35), in the original town of Chicago, in the county of Cook and State of Illinois, and also all our right, title, and interest in the "Kingsbury tract," so called, being the tract of thirty-five acres, more or less, purchased from James Kinzie by the late Major Julius J. B. Kingsbury, of the United States Army, as per deed of said Kinzie on record in the clerk's office of Cook county, Illinois, the said tract being the south half of what remains of the northwest quarter of section nine, in township thirty-nine, range fourteen, in said Cook county, Illinois, after deducting therefrom the town of Waubansia.

The other interest in said land and tenements, etc., included
569 in the deed now belongs to said Henry W. Kingsbury as one of the heirs of the late Major J. J. Kingsbury, and the entire property being subject to the dower interest of Mrs. Jane C. Kingsbury; to have and to hold the same to the said grantee, his heirs and assigns forever, the grantor- covenanting that — will warrant the property hereby conveyed.

In witness whereof we have hereunto set our hands and seals, at Louisville, this fifteenth day of May, 1861.

SIMON B. BUCKNER. [SEAL.]
MARY K. BUCKNER. [SEAL.]

STATE OF KENTUCKY, } *sct:*
County of Jefferson, }

Be it remembered that on the fifteenth day of May, A. D. 1861, before me, C. S. Thomasson, a notary public in and for said State and county, duly commissioned and qualified, personally appeared Simon B. Buckner and Mary K. Buckner, his wife, who are personally known to me to be the persons whose names are subscribed to the foregoing deed as having executed the same, and acknowledged that they had executed the same for the uses and purposes therein expressed.

And the said Mary K. Buckner, wife of the said Simon B. Buckner, being of lawful age and having been by me separate
570 and apart from her said husband *husband* examined and the contents of the said deed fully made known and explained to her, acknowledged that she had executed the same, and relinquished her dower in the lands and tenements therein mentioned voluntary and without compulsion of her said husband.

In witness whereof I have hereunto set my hand and affixed my official seal this fifteenth day of May, A. D. 1861.

[L. S.] C. S. THOMASSON.
Notary for Jefferson County, State of Kentucky.

No. 44987.
Filed May 17th, 1861.

And afterwards, to wit, at the October term, to wit, on the 4th day of November, A. D. 1870, the following, among other, proceedings

were had in said court and entered of record in said cause as follows, to wit:

HENRY W. KINGSBURY, Minor, by His Next Friend, CORYDON BECKWITH,
vs.
AMBROSE E. BURNSIDE, JANE C. KINGSBURY, SIMON B. BUCK-
571 NER, J. J. D. KINGSBURY, EVA and ALBERT G. LAWRENCE.

On motion, ordered that the defendants in cross-bill file their answer to said cross-bill within fifteen days.

And afterwards, to wit, at the November term, to wit, on the 25th day of November, A. D. 1870, the following, among other, proceedings were had in said court and entered of record in said cause as follows, to wit:

MARY K. BUCKNER and SIMON B. BUCKNER
vs.
HENRY W. KINGSBURY, EVA LAWRENCE, ALBERT G. LAWRENCE, and JANE C. KINGSBURY. } Cross-Bill.

This cause coming up on the motion of the complainants in the cross-bill herein—

It is ordered that Corydon Beckwith be, and he is hereby, appointed guardian *ad litem* for Henry W. Kingsbury, one of the defendants to cross-bill, who is a minor, under 21 years of age, and that said guardian answer*eth* cross-bill for said minor within ten days.

And thereupon, afterwards, to wit, on the 2nd day of De-
572 cember, A. D. 1870, Henry W. Kingsbury, by Corydon Beckwith, his guardian *ad litem*, filed in said court his answer in words and figures following, to wit:

Answer of Henry W. Kingsbury, by Corydon Beckwith, His Guardian ad litem.

In the Circuit Court of Cook County. In Chancery.

The answer of Henry W. Kingsbury, a minor, by Corydon Beckwith, his guardian *ad litem*, one of the defendants, to the cross-bill of complaint of Mary K. Buckner and Simon B. Buckner, complainants.

This defendant, coming by his guardian *ad litem*, reserving to himself all right of exception to the said cross-bill of complaint, for answer thereto says it is true that the bill of complaint of this defendant as aforesaid, Henry W. Kingsbury, an infant, by Corydon Beckwith, his next friend, against Ambrose E. Burnside, Jane C. Kingsbury, Mary K. Buckner, Simon B. Buckner, John J. D. Kingsbury, Eva Lawrence, and Albert G. Lawrence, was

filed in the circuit court of Cook county, Illinois, at the time alleged in said cross-bill; but whether the contents of said original bill have been well and truly set out in said cross-bill of complaint
573 this defendant neither admits or denies, but for greater certainty refers to said original bill for the contents thereof.

This defendant as aforesaid, further answering, says it is true that the complainants, Mary K. Buckner and Simon B. Buckner, on or about the 1st day of November, 1870, filed their joint and several answers to the said bill of complaint, as averred in said cross-bill; but this defendant neither admits nor denies that the said complainants have well and truly made answer to the several matters and things alleged in said bill, but refers to said answers and strict proof thereof.

This defendant as aforesaid, further answering, says he believes it to be true that the said Julius J. B. Kingsbury died on the 26 day of June, 1856, intestate, and that at the time of his death he was seized in fee simple of the lands and premises in the city of Chicago, county of Cook and State of Illinois, as mentioned and described in said cross-bill, commonly known as the "Kingsbury tract," and that such real estate of which the said Julius J. B. Kingsbury died seized *of* includes all of the land in the original bill
574 of complaint, and also that the legal title to a part of said tract of land described as a strip along the east bank of the North Branch of the Chicago river 70 feet in width for the full length of the tract was vested in the complainant, Simon B. Buckner, by a deed dated January 22d, 1855, and executed by the said Julius J. B. Kingsbury; but whether the said Julius J. B. Kingsbury was at the time of his death, as is alleged in said cross-bill, the real owner thereof, and that the complainant, Simon B. Buckner, had no beneficial interest therein, this defendant has no knowledge and is unable to state.

This defendant as aforesaid, further answering, says he believes it to be true that the said Julius J. B. Kingsbury left surviving him a widow, named Jane C. Kingsbury, and two children, the complainant, Mary K. Buckner, who afterwards intermarried Simon B. Buckner, the other complainant in said cross-bill, and this defendant's father, the said Henry W. Kingsbury, since deceased, and that the title to the real estate described in said cross-bill descended to and vested in the said Henry W. Kingsbury and the said
575 Mary K. Buckner, subject to the widow's right of dower and existing incumbrances therein.

This defendant as aforesaid, further answering, says he believes it to be true that at the time of the death of the said Julius J. B. Kingsbury the said complainants, Simon B. Buckner and Mary K. Buckner, were married, and that they afterwards had issue of said marriage a daughter, whom this defendant is informed and believes to be living, and also that the complainant, Simon B. Buckner, became vested with a life estate as tenant by the curtesy initiate in any property which may have descended to and vested in his said wife, Mary K. Buckner.

This defendant as aforesaid, further answering, says it is true that at the time of the death of the said Julius J. B. Kingsbury the said

Henry W. Kingsbury was a minor, and that the complainant, Simon B. Buckner, had the control and management of all the real estate which was left by the said Julius J. B. Kingsbury, and continued in the management thereof until it was placed under the management of Ambrose E. Burnside some time in December, 1860.

This defendant as aforesaid, further answering, says he be-
576 lieves it to be true that the said complainant, on or about the 15th day of May, 1861, signed, sealed, and acknowledged a certain deed or indenture purporting to convey to the said Henry W. Kingsbury, now deceased, an undivided half of all and singular the land and premises therein, and also in the said cross-bill of complaint in that belief [behalf] particularly described, as will more fully appear by a certified copy of said deed and certificate of acknowledge ment thereof, which, when produced, this defendant prays may be taken and considered as part of this his answer herein; and this defendant in this behalf alleges that the said deed of conveyance was made by the said complainants to the said Henry W. Kinsgbury, deceased, upon and for a valuable consideration to them in that behalf, as by the said deed or by a properly certified copy thereof, reference being had thereto, will more fully appear, but upon what consideration other than that stated in said deed this defendant does not know nor can he state, forasmuch as he is a stranger thereto, but he is advised and will insist that the same is wholly im-
577 material herein; and this defendant further alleges that the said deed was and is duly acknowledged by the said Mary K. Buckner, and that the certificate of acknowledgment stating particulars thereof was by the officer before whom the same was taken at the time thereof endorsed upon or annexed to the same deed in manner and form as then was by the laws of the State of Illinois required in respect to married women, and that the said deed and the said acknowledgement are in due form to pass the estate of the said Mary K. Buckner of and in the said premises; and this defendant further alleges in this behalf that at the time of the making of the said acknowledgment and at the time of the taking thereof by the said notary public, to wit, on the fifteenth day of May, 1861, the said Mary K. Buckner was above the age of eighteen years, and that she did not at that time reside in the State of Illinois, but that she then resided in the State of Kentucky, and that she then and there, to wit, at the county of Jefferson and State of Kentucky, joined with her said husband in the execution of said deed, which was afterwards duly delivered, whereby she became barred
578 of all estate, right, title, and interest in the premises in like manner as if she was sole — and of full age; and this defendant further allege- that at the time of the making of the said acknowledgment and at the taking thereof by the said officer same was made by the said complainant and taken by the said officer in conformity with the laws of the State of Kentucky, where the said deed was executed as aforesaid, and that the said acknowledgment was and is good and valid to all intents and purposes whatsoever; and this defendant further alleges that the said deed so made

and acknowledged as aforesaid was afterwards, to wit, about the day of the date thereof, duly delivered by the said complainants to the said Henry W. Kingsbury, deceased, and this defendant does and will insist that the said deed and the execution and acknowledgment thereof was and were in due form of law to convey the said premises therein described, and that by the said deed, executed and acknowledged, the said complainants did thereby, for good and valuable consideration, convey to the said Henry W. Kingsbury, deceased, all of the claim, right, title, and interest of them and
579 each of them of, in, and to the therein-described premises.

This defendant as aforesaid, further answering, says, touching the allegations of the said bill of complaint to the effect that the said premises were conveyed to the said Henry W. Kingsbury, deceased, as naked trustee, to hold the same in trust, that he is a stranger to all and every the said matters in the behalf alleged, and that he cannot admit the same to be true, but, on the contrary, he does and will insist on strict proof thereof; and this defendant further, in this behalf, upon information and belief, denies that the said premises were conveyed to the said Henry W. Kingsbury, deceased, as aforesaid, upon any legal or valid trust, in manner & form as is in the said cross-bill of complaint alleged or supposed; and this defendant says, in this behalf, that by an act of the Legislature of the State of Illinois entitled "Frauds and perjuries," being chapter 44 of Revised Statute- of 1845 and in force at the time of the making of the said deed of conveyance and from thence hitherto and now in force in this State, it is, amongst other things, enacted that all declarations or creations of trust or confi-
580 dence of any lands, tenements, or hereditaments shall be manifested or proved by some writing signed by the party who is by law entitled to declare such trust or by his last will in writing, or else they shall be utterly void and of no effect: Provided, That resulting trusts or trusts created by construction, implication, or operation of law need not be in writing, and the same may be proved by parol; and this defendant alleges that the said pretended trust- in the said cross-bill of complaint alleged and shown to the court are not resulting trust- nor trusts created by construction, implication, or operation of law, and he further alleges that the same are not nor have they been hitherto manifested nor can they be proved by some or any writing signed by the said Henry W. Kingsbury, deceased, nor by his last will in writing, and this defendant insists upon the said statute and claims the said [same] benefit therefrom as if he had pleaded the same.

This defendant as aforesaid, further answering, says that it may be true, as alleged in said cross-bill of complaint, that the said Henry W. Kingsbury, now deceased, about the 25th day of March,
581 1862, wrote with his own hand and signed a certain instrument of writing in and by the said cross-bill called a last will and testament and in said bill particularly set forth; but this defendant says he is a stranger thereto and leaves the said complainant- to make full proof thereof and of the matters alleged in respect thereof, as they may be advised, and this defendant does and

conveyed to divers persons, the particulars and circumstances whereof were not at the time and times thereof well known to the said Simon B. Buckner and still well known to him and the said Mary K. Buckner or one of them.

And this defendant as aforesaid further saith that he is an infant under the age of twenty-one years—that is to say, of the age of seven years or thereabouts—and humbly submits his rights and interests to the protection of this honorable court.

C. BECKWITH,
Guardian ad Litem of Henry W. Kingsbury.

And thereupon, afterwards, to wit, on the 2d day of December, A. D. 1870, Eva Lawrence and Albert G. Lawrence, by Beckwith, Ayer and Kales, their solicitors, filed in said — their certain answer in words and figures following, to wit:

In the Circuit Court of Cook County. In Chancery.

Answer of Eva and Albert G. Lawrence to the Cross-Bill.

The joint and several answers of Eva Lawrence and Albert G. Lawrence, two of the defendants, to the cross-bill of complaint of Mary K. Buckner and Simon B. Buckner, complainants.

588 These defendants, reserving to themselves all right of exception to the said cross-bill of complaint, for answer thereto say they admit that the bill of complaint of Henry W. Kingsbury, an infant, by Corydon Beckwith, his next friend, against Ambrose E. Burnside, Jane C. Kingsbury, Mary K. Buckner, Simon B. Buckner, John J. D. Kingsbury, Eva Lawrence, and Albert G. Lawrence was filed in the circuit court of Cook county, Illinois, at the time alleged in said cross-bill, but whether the contents of said original bill have been well and truly set out in said cross-bill by the said complainants these defendants neither admit -or deny, but for *the* greater certainty refer to said original bill for the contents thereof.

These defendants, further answering, say they admit that the complainants, Mary K. Buckner and Simon B. Buckner, on or about the first day of November, 1870, filed their joint and several answers to the said bill of complaint, as averred in said cross-bill; but these defendants neither admit nor deny that the said complainants have well and truly made answer to the several matters and things alleged in said bill, but refer to the said answer and proof thereof.

589 These defendants, further answering, say they admit that the said Julius J. B. Kingsbury died on the twenty-sixth day of June, 1856, intestate, and that at the time of his death he was seized in fee simple of the lands and premises in the city of Chicago, Cook county and State of Illinois, as mentioned and described in said cross-bill, commonly known as "Kinzie tract," and that such real estate of which the said Julius J. B. Kingsbury died seized *of* includes all of the lands in the original bill of complaint; and they also admit that the legal title to a part of said tract of land

described as a strip along the east bank of the North Branch of the Chicago river 70 feet in width for the full length of the tract was vested in the complainant, Simon B. Buckner, by a deed dated January twenty-second, 1855, and executed by the said Julius J. B. Kingsbury, but whether the said Julius J. B. Kingsbury was at the time of his death, as is alleged in said cross-bill, the real owner thereof, and that the complainant, Simon B. Buckner, had no beneficial interest therein, these defendants have no knowledge and are unable to state.

590 These defendants, further answering, say they admit that the said Julius J. B. Kingsbury left surviving him *him* a widow, named Jane C. Kingsbury, and two children—the complainant, Mary K. Buckner, who afterwards intermarried Simon B. Buckner, the other complainant in said cross-bill, and the said Henry W. Kingsbury, since deceased—and that the title to the real estate described in said cross-bill descended to and vested in the said Henry W. Kingsbury and the said Mary K. Buckner, subject to widow's right of dower and existing incumbrances thereon.

These defendants, further answering, say they admit that at the time of the death of the said Julius J. B. Kingsbury the said complainants, Simon B. Buckner and Mary K. Buckner, were married, and that they afterwards had issue of said marriage, a daughter, whom the defendants are informed and believe to be living; and they also admit that the complainant, Simon B. Buckner, became vested with a life estate as tenant by the curtesy initiate in any property which may have descended to and vested in his said wife, Mary K. Buckner.

591 These defendants, further answering, say they admit that at the time of the death of the said Julius J. B. Kingsbury the said Henry W. Kingsbury was a minor, and that the complainant, Simon B. Buckner, had the control and management of all the real estate which was left by the said Julius J. B. Kingsbury, and continued in the management thereof until it was placed under the management of Ambrose E. Burnside, some time in December, 1860.

These defendants, further answering, admit that the said complainants, on or about the 15th day of May, 1861, signed, sealed, and acknowledged a certain deed or indenture purporting to convey to the said Henry W. Kingsbury, now deceased, an undivided half of all and singular the lands and premises therein, and also in the said cross-bill of complaint in that behalf particularly described, as will more fully appear by a certified copy of said deed and certificate of acknowledgment thereof, which, when produced, these defendants pray may be taken and considered as part of this their answer herein; and these defendants in this behalf allege that the said deed of conveyance was made by said complainants to the said Henry W.

592 Kingsbury, deceased, upon and for a valuable consideration to them in that behalf, as by the said deed or by a properly certified copy thereof, reference being had thereto, will more fully appear, but upon what consideration other than that stated in said deed these defendants do not know nor can they

state, forasmuch as they are strangers thereto, but they are advised and will insist that the same is wholly immaterial herein; and these defendants further allege that the said deed was and is duly acknowledged by the said Mary K. Buckner, and that the certificate of acknowledgment stating the particulars thereof was by the officer before whom the same was taken at the time thereof endorsed upon or annexed to the said deed in manner and form as then was by the laws of the State of Illinois required in respect of married women, and that the said deed and the said acknowledgment are in due form to pass the estate of the said Mary K. Buckner of and in the said premises; and these defendants further allege in this behalf at the time of the making of the said acknowledgment of said deed and at the taking thereof by the said notary public, to wit, on the fifteenth day of May, 1861, the said Mary K. Buckner
593 was above the age of eighteen years, and that she did not at that time reside in the State of Illinois, but that she then resided in the State of Kentucky, and that she then and there, to wit, at the county of Jefferson and State of Kentucky, joined with her said husband in the execution of said deed, which was afterwards duly delivered, whereby she became barred of all estate, right, title, and interest in the premises in like manner as if she was sole — and of full age; and these defendants further allege that at the time of the making of the said acknowledgment and at the taking thereof by the said officer the same was made by the said complainants and taken by the said officer, in conformity with the laws of the State of Kentucky, where the said deed was executed as aforesaid, and that the said acknowledgment was and is good and valid to all intents and purposes whatsoever; and these defendants further allege that the said deed so made and -knowledged as aforesaid was afterwards, to wit, about the day of the date thereof, duly delivered by the said complainants to the said Henry W. Kingsbury, deceased; and these defendants do and will insist that the
594 said deed and the execution and acknowledgment thereof was and were in due form of law to convey the said premises therein described, and that by the said deed so executed and acknowledged the said complainants did thereby, for good and valuable consideration, convey to the said Henry W. Kingsbury, deceased, all of the claim, right, title, and interest of them and each of them of, in, and to the therein-described premises.

These defendants, further answering, say, touching the allegations of the said bill of complaint to the effect that the said premises were conveyed to the said Henry W. Kingsbury, deceased, as naked trustee to hold the same in trust, that they are strangers to all and every the said matters in that behalf alleged, and that they cannot admit the same to be true, but, on the contrary, they do and will insist on strict proof thereof.

And these defendants further in this behalf, upon their information and belief, deny that the said premises were conveyed to the said Henry W. Kingsbury as aforesaid upon legal or valid trust in manner and form as is in the said cross-bill of complaint
595 alleged or supposed; and these defendants say in this behalf

that by an act of the Legislature of the State of Illinois entitled "Frauds and Perjuries," being chapter 44 of the Revised Statutes of 1845 and in force at the time of the making of said deed of conveyance, and from thence hitherto and now in force in this State, it is, amongst other things, enacted that all declarations or creations of trust or confidences of any lands, tenements, or hereditaments shall be manifested and proved by some writing signed by the party who is by law entitled to declare such trust or by his last will in writing or else they shall be utterly void and of no effect: Provided, That resulting trusts or trusts created by construction, implication, or operation of law need not be in writing, and the same may be proved by parlo [parol]; and these defendants allege that the said pretended trusts in the said cross-bill of complaint alleged and shown to the court are not resulting trusts nor trusts created by construction, implication, or operation of law, and they further allege that the same are not nor have they been hitherto manifested nor can they be proved by same or any writing
596 signed by the said Henry W. Kingsbury, deceased, nor by his last will in writing, and these defendants insist upon the said statute and claim the same benefit therefrom as if they had pleaded the same.

These defendants, further answering, say that it may be true, as alleged in said cross-bill of complaint, that the said Henry W. Kingsbury, now deceased, on or about the 25th day of March, 1862, wrote with his own hand — signed a certain instrument of writing in and by the said cross-bill called a last will and testament and in said bill particularly set forth, but these defendants say they and each of them are strangers thereto, and they leave the said complainants to make full proof thereof as they may be advised; and these defendants do and will insist that the said pretended instrument of writing is wholly void as a devise of the real estate of the said Henry W. Kingsbury, deceased, situated in the State of Illinois, to wit, the lands and premises aforesaid, and that nothing in the said lands and premises passed to the said complainants or either of them by or by force of the said pretended instrument of
597 writing, and these defendants deny that the same was or is sufficient in the law to manifest or prove any trust or confidence of or concerning the lands and premises aforesaid in manner and form as the said complainants in their said cross-bill of complaint have in that behalf alleged or supposed.

These defendants, further answering, admit that on or about the 4th day of December, 1861, the said Henry W. Kingsbury, now deceased, intermarried with the said Eva Lawrence, one of these defendants, then Eva Taylor; that said Kingsbury was afterwards, on or about the 17th day of September, 1862, killed at the battle of Antietam, and that afterwards, to wit, on the 16th day of December, 1862, a posthumous son was born to him of her, the said Eva; that he was named after his father and is the complainant in the original bill herein, and that afterwards, on the 26th day of September, 1865, the said Eva intermarried with the said Albert G. Lawrence, the other of these defendants, as is alleged in said cross-bill.

These defendants, further answering, say that the said Henry W. Kingsbury, deceased, was, at the time of his death, in the military service of the United States, but that at that time his place of residence and domicile was within the State of Conne-ticut, and that he was then a citizen thereof, and that he had not at that time or afterwards any property, effects, or residence within the State of Virginia, wherein it is by the said cross-bill alleged the said pretended will was written.

598

These defendants, further answering, say that the said Henry W. Kingsbury, deceased, died seized of all and singular the lands and premises in the said cross-bill of complaint described, and that the said posthumous son was the only child of said marriage of the said Eva and the said Henry W. Kingsbury, deceased; and these defendants say that it doth not appear by the said pretended will that it is the intention of the said Henry W. Kingsbury, deceased, to disinherit the said posthumous child—that is to say, the said complainant in the original bill of complaint filed herein; and so these defendants say that the said posthumous child became and was upon his birth entitled to have and receive all and singular the said lands and tenements, anything in the said pretended will to the contrary notwithstanding, and that from thence hitherto the said posthumous child has been and still is seized of all and singular the said premises, subject to the rights of dower therein of the said Jane C. Kingsbury, his grandmother, and of the said Eva Lawrence, one of these defendants, his mother, and that at the time of the filing of the said cross-bill herein the said Simon B. and Mary K. Buckner had not nor had either of them nor have they since had any right, title, or interest of, in, and to the said premises or any part or parcel thereof in manner and form as they have in and by their said cross-bill alleged or claimed.

599

These defendants, further answering, say that at the time of the filing of the said original bill of complaint herein and from thence hitherto the said Eva Lawrence, one of these defendants, has been and still is in the enjoyment of her said dower right and interests in the said lands and premises by and through the said John Woodbridge, receiver, appointed by this court, in manner and form and under the proceedings in that behalf in the said original bill of complaint alleged and shown, and that she hath good right to her said dower in and to the said lands and premises and every part thereof, anything in the said cross-bill of complaint alleged or stated to the contrary notwithstanding.

600

These defendants, further answering, say, as respects the said pretended and stated will and testament of the said Henry W. Kingsbury, deceased, and alleged probate thereof under the laws of the State of Virginia, that they deny the said pretended paper writing was or is executed or made by the said Henry W. Kingsbury, deceased, in such manner and form as to make the same a good and valid devise or last will and testament, and they deny that the same was made, published, and declared by the said alleged testator in accordance with the laws of the State of Virginia, as in said cross-bill alleged, and they allege that at the time and times of the alleged

execution thereof and from thence up to the time of his death he, said Henry W. Kingsbury, had not any property, real or personal, in nor did he then or his estate since owe any debts in said State of Virginia, and that at the time of his death and from thence hitherto and at the time and times of said alleged probating of the said
601 paper writing called a last will and testament in the corporation court of the city of Aleexandria there was not and had not been any property or effects which were of him or belonged to him, the said Henry W. Kingsbury, in his lifetime or his estate since his death, and that at the time of his death he was not and he had never previously thereto been a citizen of nor had his domicile within the State *State* of Virginia.

And these defendants allege and insist that at the time and times when the said proceedings are alleged to have taken place in said corporation court touching said probate that said court had not nor had it at any time or times previously jurisdiction in the premises to permit or allow the said pretended paper to be proved in said court as a last will and testament of the said Henry W. Kingsbury, and that the said pretended proceedings were without notice to these defendants; and these defendants deny all manner of illegal or inequitable pretences wherewith they are by said cross-bill charged, without this, at [that] there is any other matter, cause, or thing in the said complainant's said bill of complaint contained material or necessary for these defendants to make answer unto and
602 not herein or hereby well and sufficiently answered, confessed, traversed and avoided, or denied is true, to the knowledge or belief of these defendants; all which matters and things these defendants are ready and willing to aver and maintain and prove as this honorable court — direct, and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf sustained.

EVA LAWRENCE,
ALBERT G. LAWRENCE,
By their solicitor, B. F. AYER.

And thereupon, afterwards, to wit, on the 5th day of December, A. D. 1870, Simon B. Buckner and Mary K. Buckner, by their solicitors, Goudy & Chandler, filed in said court their certain replications to the joint and several answers of Eva Lawrence, Albert G. Lawrence, and Henry W. Kingsbury in words and figures following, to wit:

Replication.

STATE OF ILLINOIS, } ss:
Cook County, }

In the Circuit Court of Cook County, of the November Term, 1870.
In Chancery.

603 The replication of Simon B. Buckner and Mary K. Buckner, complainants, to the joint and several answers of Eva Lawrence and Albert G. Lawrence, two of the defendants, to the cross-bill of said complainants.

These repliants, saving and reserving to themselves all and all manner of advantage of exception which may be had and taken to the manifold avows [errors], uncertainties, and insufficiencies of the answer of the said defendants, for replication thereunto says that they do and will aver, maintain, and prove said cross-bill to be true, certain, and sufficient in the law to be answered unto by the said defendants, and that the answer of the said defendants is very uncertain, evasive, and insufficient in the law to be replied unto by these repliants, without this, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avowed [avoided], traversed or denied, is true; all which matters and things these repliants are ready to aver, maintain, and prove as this honorable court shall direct, and humbly pray as in and by their said cross-bill they have already prayed.

GOUDY & CHANDLER,
Solicitors for Complainants in said Cross-Bill.

604 *Replication.*

STATE OF ILLINOIS, } ss:
Cook County, }

In the Circuit Court of Cook County, of the November Term, A. D. 1870. In Chancery.

The replication of Simon B. Buckner and Mary B. Buckner, complainants, to the answer of Henry W. Kingsbury, by his guardian *ad litem*, to the cross-bill of complaint of said complain-ts.

These repliants, saving and reserving to themselves all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the said defendant, for replication thereunto saith that they do and will aver, maintain, and prove said cross-bill to be true, certain, and sufficient in the law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive, and insufficient in the law to be replied unto by these repliants, without this, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto and

not herein and hereby well and sufficiently replied unto, con-
605 fessed or avoided, traversed or denied, is true; all which matters and things these repliants are ready to aver, maintain, and prove as this honorable court shall direct, and humbly pray as in and by their said cross-bill they have already prayed.

GOUDY & CHANDLER,
Solicitors for Complainants in said Cross-Bill.

And afterwards, to wit, at the December term, to wit, on the 24th day of December, A. D. 1870, the following, among other, proceedings were had in said court and entered of record in said cause as follows, to wit:

STATE OF ILLINOIS:

Cook County Circuit Court. December Term, 1870.

HENRY W. KINGSBURY, a Minor, Who Sues by His Next Friend, CORYDON BECKWITH, *vs.* AMBROSE E. BURNSIDE, SIMON B. BUCKNER, Mary K. Buckner, Jane C. Kingsbury, John J. D. Kingsbury, Eva Lawrence, and Albert G. Lawrence.	Original Bill in Chancery.
606 MARY K. BUCKNER and SIMON B. BUCKNER *vs.* HENRY W. KINGSBURY, JANE C. KINGSBURY, EVA LAWRENCE, and ALBERT G. LAWRENCE.	Cross-Bill in Chancery.

This cause coming on for a final hearing on the bill of complaint, the answers and replications, the cross-bill of complaint, the answers and replications, and the evidence and proofs taken, produced, and read in evidence, and the court being now sufficiently advised in the premises—

It is ordered, adjudged, and decreed that the original bill of complaint be dismissed without prejudice, and that the defendants thereto have and recover their costs in this behalf expended.

And it is further ordered, adjudged, and decreed that the cross-bill of complaint be dismissed without prejudice, and that the defendants thereto have and recover their costs in this behalf expended.

And it is further ordered that this decree be entered as of the 24th day of December, 1870; *by* and thereupon the complainant in the original bill, by his next friend, Corydon Beckwith, prayed an appeal to the supreme court, and, a bond being waived by the other parties, such appeal is allowed.

607 And thereupon the complainants in the cross-bill prayed an appeal to the supreme court, and, a bond being waived by the other parties, such appeal is allowed.

And the parties aforesaid in open court agree that such appeals

may be prosecuted to and the record filed in the central grand division at its next term, and that one record may be used for both appeals.

And thereupon, afterwards, to wit, on the 31st day of December, A. D. 1870, the Honorable John G. Rogers, one of the judges of said court, signed a certain certificate of evidence in words and figures following, to wit:

STATE OF ILLINOIS:

Cook County Circuit Court. December Term, 1870.

HENRY W. KINGSBURY, a Minor, Who Sues by His Next Friend, CORYDON BECKWITH,
vs.
AMBROSE E. BURNSIDE, SIMON B. BUCKNER, MARY K. Buckner, Jane C. Kingsbury, John J. D. Kingsbury, Eva Lawrence, and Albert G. Lawrence. } Original Bill in Chancery.

608 MARY K. BUCKNER and SIMON B. BUCKNER
vs.
HENRY W. KINGSBURY, JANE C. KINGSBURY, EVA LAWRENCE, and ALBERT G. LAWRENCE. } Cross-Bill in Chancery.

Certificate of Evidence.

I, John G. Rogers, a judge of the circuit court of Cook county, Illinois, hereby certify that the following evidence was introduced and read on the final hearing of the above cause:

Testimony of the Complainant in the Original Bill.

1. The statute of the State of Kentucky in force at the time of the acknowledgment by Mary K. Buckner of the certain deed of herself and her husband to Henry W. Kingsbury hereinafter put in evidence and dated the 15th day of May, 1861.

And here in open court it was thereupon stipulated that said statutes might be here and on appeal in the supreme court read with the same effect from the authorized publication thereof as if here inserted at large.

2. And the following stipulation was also read in evidence:

Stipulation.

609 For the purposes of this trial and the appeal thereof it is admitted that Henry W. Kingsbury, deceased, had no property of any kind in the State of Virginia at the time of his death, and that since his death there has been no property in said State belonging to his estate except such as may be claimed from the following circumstances:

That General S. B. Buckner, a citizen and resident of Kentucky,

had some money on deposit just prior to and on May 9, 1870, in Alexandria, in the State of Virginia, and A. E. Burnside, one of the executors named in the will or paper purporting to be such, claiming that said Buckner was indebted to said Kingsbury estate, attached said money in a suit to recover the amount of said claim; also that at time of Henry W. Kingsbury's death some books, drawing-, and papers, not exceeding in value one hundred dollars, claimed to belong to Henry W. Kingsbury *in* were in the possession of S. B. Buckner; that afterwards and not more than ten days or two weeks before May 9, 1870, the said books, drawings, and papers were carried by S. B. Buckner to Alexandria, in the State of Virginia, from some place out of the same, which books, drawing-,
610 and papers were in Alexandria, in the State of Virginia, at the time the said will was probated, and have since remained there.

GOUDY & CHANDLER,
Solicitors for the Parties for Whom They Have Appeared.

Also copy of power of attorney from Henry W. Kingsbury and Jane C. Kingsbury to A. E. Burnside, dated October 22, 1861:

Know all men by these presents that we, Jane C. Kingsbury, of Lynn, Connecticut, and Henry W. Kingsbury, of the U. S. Army, have made, constituted, and appointed, and — these presents do make, constitute, and appoint, Ambrose E. Burnside, of New York, our true and lawful attorney, for us and in our name, place, and stead to transact and conduct the business of the Kingsbury estate, of Chicago; to collect rents, make improvements and repairs, lease property, conduct lawsuits, and do whatever else is necessary for the interest of the estate, but with no power to dispose of the property except in the way of negotiating loans, etc., with the ordinary restrictions, and with no power to lease property for a longer term than three years without our consent, giving and granting unto him, said attorney, full power and authority to do and perform
611 all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully, to all intents and purposes, as we might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that the said attorney or his substitute shall lawfully do or cause to be done by virtue hereof.

In witness whereof we have hereunto set our hands and seals the 22nd day of October, in the year one thousand eight hundred and — one.

[SEAL.] HENRY W. KINGSBURY,
U. S. Army.
JANE C. KINGSBURY.

Sealed and delivered in presence of—
JAMES H. CAUSTEN,
To H. W. Kingsbury.
OLIVER J. LAY,
To Jane C. Kingsbury.

DISTRICT OF COLUMBIA, } *To wit:*
City of Washington, }

Be it known that on the twenty-second day of October, in the year one thousand eight hundred and sixty-one, before me, James H. Causten, notary public, personally appear- H. W. Kingsbury, the maker of the aforegoing letter of attorney, and acknowledged the above letter of attorney to be his act and deed.

In testimony whereof I have hereunto subscribed my name
612 the day and year last above written and affixed my notarial seal.

[SEAL.] JAMES H. CASTEN,
Notary Public.

STATE OF CONNECTICUT, } *ss:*
New London County, Old Lynn, }

Be it known that on the thirteenth day of October, A. D. 1861, before me, Oliver J. Lay, notary public, personally appeared Jane C. Kingsbury, one of the makers of the foregoing power of attorney, and acknowledged the same to be her act and deed.

In testimony whereof I have hereunto subscribed my name the day and year last above written and affixed my notarial seal.

[L. S.] OLIVER J. LAY,
Notary Public.

No. 49305. Filed November 7th, 1861.

The complainants in the cross-bill and the defendants to the original bill also offered and read in evidence the following proof, to wit:

1. A patent issued by the State of Illinois to Robert Kinzie, dated July 5, 1833, granting and conveying in fee lot 5, in block 35, in the original town of Chicago, Cook county, Illinois, according to
613 the plat of said town made by the commissioners of the Illinois and Michigan canal, laid out in the S. ½, section 9, township 39 N., — 14 E., of the 3d principal meridian, being canal land, reciting that said lot had been purchased by said Kinzie Sept. 27, 1830.

2. A deed from Robert Kinzie to Julius J. B. Kingsbury, dated May 31, 1833, conveying in fee, with the usual covenants of title and warranty, the same lot for the consideration of $60.

3. A patent issued by the State of Illinois to John B. Beaubien, dated July 18, 1831, granting and conveying in fee lot 6, in block 35 aforesaid, reciting that it had been purchased by said Beaubien Sept. 27, 1830.

4. A deed from John B. Beaubien and wife to Julius J. B. Kingsbury, dated May 31, 1833, conveying in fee said lot 6, in block 35 aforesaid, for the consideration of $50.

5. A patent issued by the State of Illinois to James Kinzie, dated October 20, 1831, granting and conveying in fee the E. ½ N. W. ¼, section 9, township 39 N., of range 14 E., of the 3d principal meridian, containing eighty acres and being canal land, and which had been sold to said Kinzie Sept. 28, 1830, for $140.

614 6. A deed from James Kinzie and wife to Julius J. B. Kingsbury, dated May 30, 1833, and recorded May 31, 1833, in Book A, page 139, which reads as follows:

This indenture, made and entered into this thirtieth day of May, in the year of our Lord one thousand eight hundred and thirty-three, by and between James Kinzie — Leah Kinzie, his wife, of the town of Chicago, Cook county, Illinois, and Lieutenant Julius J. B. Kingsbury, of the United States Army, witnesseth:

That the said James Kinzie and Leah Kinzie, his wife, party of the first part aforesaid, for and in consideration of the sum of seven hundred dollars, current money of the United States, to them in hand paid by the said Julius J. B. Kingsbury, party of the second part aforesaid, the receipt whereof is hereby acknowledged and the said party of the second part therefrom discharged, have granted, bargained, sold, aliened, released, and confirmed, and by these presents doth bargain, and sell, alien, release, and confirm, unto the said Julius J. B. Kingsbury the following-described lot or parcel of land situate, lying, and being in Cook county, in the State of
615 Illinois, and adjacent to the town of Chicago, and described and bounded as follows, to wit:

From the southeast corner of the town of Waubansia, commencing at the southeast corner of lot number one, in block number one, in the said town of Waubansia (James Kinzie's Addition to the town of Chicago), adjoining Kinzie street, in town of Chicago (as laid off by the commissioners of the Illinois and Michigan canal), at a stake at the said corner of said lot on the southwest bank of the North Branch of the Chicago river, at or near the water's edge on the said bank of the said branch of the said Chicago river, continuing at about north twenty-eight — west along the said southwest bank of the North Branch of the said Chicago river, varying in distance from the water's edge in proportion to the distance of the east and west lines dividing the lots, blocks, streets, and alleys of blocks one, two, and three, in the said town of Waubansia, with the exception of lot number eight, in block number two, which was conveyed by the said James Kinzie and Leah, his wife, to Seth Johnson, which said lot extends eastwardly unto the centre of the channel of the North Branch of the Chicago river to the intersection of the
616 west line of the town of Waubansia; thence north and terminating in the Chicago river; thence from a stake ninety links from the corner, from which a poplar bears north seventy — east and a lynn bearing south eighty-four degrees six — nineteen chains and two links to a stake, from which a lynn bears north seventy eight — thirty — west, and also bears north two — thirty — west; thence twenty-two chains and seventy-five links to a corner established by the commissioners of the Illinois and Michigan canal; thence four chains and forty-six links to the Chicago river (North Branch); thence three chains and forty-five links to the place of beginning, the same being the one equal half of the remaining part of the east half of the northwest quarter of section number nine, in township number thirty-nine north, range fourteen east, after taking

therefrom the said town of Waubansia, and the said half of the said remaining part of said tract of land is supposed to contain thirty-five acres or near that quantity, be the same more or less:

To have and to hold the said tract or parcel of land before described and hereby conveyed to the said Julius J. B. Kingsbury, his heirs and assigns forever, and to his and their only proper
617 use and benefit and behoof, together with all and singular the rights, privileges, and appurtenances, rents, issues, and profits, remainder and remainders, reversion and reversions, unto the same belonging or in anywise appertaining.

And the said James Kinzie and Leah Kinzie, his wife, hereby covenants and agrees to and with the said Julius J. B. Kingsbury that before the unsealing and delivery of these presents they were well seized of the premises hereby conveyed of a good, indefeasable estate in fee simple, and that they had good right, full power, and legal authority to sell and convey the same in manner and form aforesaid, and that the same is free from all incumbrances whatever.

And the said James Kinzie and Leah, his wife, further covenants and agrees to and with the said Julius J. B. Kingsbury that they will warrant and forever defend the premises hereby conveyed against the claim or claims of any person or persons claiming by, or through or under them, or against the claim or claims of any other person or persons whomsoever.

In testimony whereof the said James Kinzie and Leah, his
618 wife, have hereto set their hands and affixed their seals, at Chicago, the day and year first above written.

JAMES KINZIE. [SEAL.]
LEAH KINZIE. [SEAL.]

Signed, sealed, and delivered in the presence of—
JESSE WALKER.
E. A. BOND.
ENOCH DARLING.

STATE OF ILLINOIS, } ss:
Cook County, }

This day personally appeared before me, the undersigned, a justice of the peace in and for said county, James Kinzie and Leah Kinzie, wife of the said James, both personally known to said justice to be the real persons who executed the foregoing deed of conveyance, who then, before said justice, acknowledged that they signed, sealed, and delivered said deed freely and voluntarily for the uses and purposes therein mentioned.

And the said Leah, the wife of the said James, in a private examination by me, separate and apart from her said husband, declared that she executed the said deed freely and with her own consent, without fear or compulsion of her said husband.

619 Given under my hand and seal this 30th day of May, 1833.

ISAAC HARMON, *J. P.* [SEAL.]

Recorded May 31st, 1833.

RICH'D J. HAMILTON, *Rec.*

7. A deed from Julius J. B. Kingsbury to Simon B. Buckner, dated January 22, 1855, conveying in fee, for the consideration of $400,000, a part of the tract of land described in the preceeding deed and described as follows: Commencing on Kinzie street, at a point seventy feet east from the east bank of the North Branch of the Chicago river, thence running northwesterly on a line seventy feet distance from the east bank of the North Branch and parallel thereto, to the south line of Sedgwick's Addition to Chicago, being the north line of the tract described in the preceeding deed, and extending far enough west to include all the lands owned by the grantor in said E. ½ N. W. ¼, section 9, — 39 N., — 14 E., aforesaid, and west of said line, which deed was recorded January 23d, 1855.

8. A certified copy of the paper purporting to be the will of Henry W. Kingsbury, deceased, and proof thereof from the corporation court of the city of Alexandria, in the State of Virginia, which reads as follows, to wit:

620 "Expecting soon to start upon a military expedition where death may overtake me, I leave this as a record of my wishes respecting the disposition of my property:

"To my mother, Jane C. Kingsbury, I leave twenty thousand dollars, or so much of my Chicago property as upon fair appr-isal may be valued at that amount.

"To my sister, Mary K. Buckner, I leave so much of the Chicago property held in my name as shall amount to one-third of the property in the city of Chicago, Ill., left by my father, Julius J. B. Kingsbury, deceased.

"To my cousin, John J. D. Kingsbury, I leave my property in Waterbury, Connecticut, and, in addition thereto, five thousand dollars, which I trust he will expend in completing his education. The remainder of my property of every description I leave to my devoted wife, Eva. I desire, moreover, that the provisions of this will may be carried out so that the yearly income of my wife for her own personal support shall never be less than two thousand dollars ($2,000).

"As executors I name Ambrose E. Burnside, of Rhode Island, and Capt. John Taylor, com. dep't, U. S. Army."

Signed at Fortress Monroe, Va., March 25th, 1862.

621 HENRY W. KINGSBURY,
Fir-t Lieutenant 5th Reg't Artillery, U. S. Army.

STATE OF VIRGINIA:

Corporation Court of the City of Alexandria, May 9, 1870.

A writing purporting to be the last will and testament of Henry W. Kingsbury was produced in court by C. W. Wattles, and there being no subscribing witness thereto, S. B. Buckner and Charles H. Hatch were sworn and deposed that they are well acquainted with the testator's handwriting, and verily believe the said writing and the name thereto subscribed to be wholly written by the testator's own hand; whereupon the said writing is ordered to be recorded as the true and

last will and testament of the said Henry W. Kingsbury, deceased; and at a corporation court for the city of Alexandria continued and held on the 10th day of May, 1870, Ambrose E. Burnside, one of the executors named in the last will and testament of Henry W. Kingsbury, deceased, on motion of C. W. Wattles, has leave to qualify.

Whereupon he executed his bond, with James M. Stuart
622 his security, in the penalty of five hundred dollars, conditioned according to law.

STATE OF VIRGINIA,
Corporation Court of the City of Alexandria, } *ss:*

I, Morton Marye, clerk of the corporation court of the city of Alexandria, in the State of Virginia, do hereby certify that the foregoing is a true and complete copy of the last will and testament of Henry W. Kingsbury, deceased, and of the proof thereof before said court as the same appears of record in my office; and I further certify that the said will was duly executed and proved agreeably to the laws and usages of the State of Virginia, in which the same purports to have been executed.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court this 5th day of July, A. D. 1870.

[SEAL.] MORTON MARYE, *Clerk.*

STATE OF VIRGINIA,
Alexandria City, } *ss:*

I, Enoch M. Lowe, only judge of the corporation court of the city of Alexandria, in the State of Virginia, do hereby certify
623 that Morton Marye, who hath given the preceeding certificate, is clerk of the said court, and that his attestation is in due form.

Given under my hand this fifth day of July, A. D. 1870.

E. M. LOWE,
Judge of the Corporation Court of the City of Alexandria.

9. A certified copy of same, together with the order of the county court of Cook county, Illinois, which reads as follows, to wit:

STATE OF ILLINOIS,
Cook County, } *ss:*

I, John G. Gindele, clerk of the county court of Cook county, in the State aforesaid, do hereby certify that the annexed is a true and complete copy of the last will and testament of Henry W. Kingsbury, deceased, together with the proof thereof before the corporation court of the city of Alexandria, Virginia, and the certificate authenticating the same, and of the order of the county court of Cook county, in the State of Illinois, in regard thereto, as the same appears and remains of record in my office.

In testimony whereof I have hereunto set my hand and
624 affixed the seal of said county court, at Chicago, in said county, this twenty-fifth day of July, A. D. 1870.

[SEAL.] JOHN G. GINDELE, *Clerk.*

[Int. rev. stamp, 5c., cancelled.]

Expecting soon to start upon a military expedition where death may overtake me, I leave this as a record of my wishes respecting the disposition of my property.

To my mother, Jane C. Kingsbury, I leave twenty thousand dollars, or so much of my Chicago property as upon fair appr-isal may be valued at that amount.

To my sister, Mary J. Buckner, I leave so much of the Chicago property held in my name as shall amount to one-third of the property in the city of Chicago, Illinois, left by my father, Julius J. B. Kingsbury, deceased.

To my cousin, John J. D. Kingsbury, I leave my property in Waterbury, Connecticut, and, in addition thereto, five thousand dollars, which I trust he will expend in completing his education.

The remainder of my property of every description I leave to my devoted wife, Eva.

I desire, moreover, that the provisions of this will may be
625 so carried out that the yearly income of my wife for her own personal support shall never be less than two thousand dollars ($2,000).

As executors I name General Ambrose E. Burnside, of Rhode Island, and Capt. John Taylor, com. dep't, U. S. Army.

Signed at Fortress Monroe, Va., March 25th, 1862.

HENRY W. KINGSBURY,
1st Lieutenant 5th Reg't Artillery, U. S. Army.

STATE OF VIRGINIA:

Corporation Court of the City of Alexandria, May 9th, 1870.

A writing purporting to be the last will and testament of Henry W. Kingsbury was produced in court by C. W. Wattles, and there being no subscribing witness thereto, S. B. Buckner and Charles H. Hatch were sworn and deposed that they are well acquainted with the testator's handwriting, and verily believe the said writing and the name thereto subscribed to be wholly written by the testator's own hand.

Whereupon the said writing is ordered to be recorded as
626 the true last will and testament of the said Henry W. Kingsbury, deceased; and at a corporation court for the city of Alexandria continued and held on the 10th day of May, 1870, Ambrose E. Burnside, one of the executors named in the last will and testament of Henry W. Kingsbury, deceased, on motion of C. W. Wattles, has leave to qualify.

Whereupon he executed his bond, with James M. Stewart his security, in the penalty of five hundred dollars, conditioned according to law.

STATE OF VIRGINIA,
Corporation Court of the City of Alexandria, } *ss:*

I, Morton Marye, clerk of the corporation court of the city of Alexandria, in the State of Virginia, do hereby certify that the foregoing is a true and complete copy of the last will and testament of Henry W. Kingsbury, deceased, and of the proof thereof before said court as the same appears of record in my office; and I further certify that the said will was duly executed and proved agreeably to the laws and usages of the State of Virginia, in which the same purports to have been executed.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court this fifth day of July, A. D. 1870.

627 [SEAL.] MORTON MARYE, *Clerk.*

STATE OF VIRGINIA,
Alexandria City, } *ss:*

I, Enoch M. Lowe, only judge of the corporation court of the city of Alexandria, in the State of Virginia, do hereby certify that Morton Marye, who hath given the preceeding certificate, is clerk of the said court, and that his attestation is in due form.

Given under my hand this fifth day of July, A. D. 1870.

E. M. LOWE,
Judge of the Corporation Court of the City of Alexandria.

STATE OF ILLINOIS,
Cook County, } *ss:*

Be it remembered that on this day, to wit, on the eleventh day of July, A. D. 1870, the same being one of the days of the July term of the county of Cook court—present thereat, Hon. M. R. M. Wallace, judge; Benj. L. Cleaves, coroner and *ex offi.* sheriff; John G. Gindele, clerk—the following, among other, proceedings were by and before said court had and entered of record:

628 HENRY W. KINGSBURY ESTATE.

Ordered to put on record an authenticated copy of the will of deceased.

And now comes Ambrose E. Burnside, one of the executors named in the will herein mentioned, by his attorneys, Gowdy & Chandler, and presents a copy of the last will and testament of Henry W. Kingsbury, deceased, and the proof thereof before the corporation court of the city of Alexandria, in the State of Virginia, with a certificate of the clerk of said court under the seal of said court; that the same is a true and complete copy of the last will and testament of Henry W. Kingsbury, deceased, and of the proof thereof before said court as the same appears of record in his office, and that the said will was duly executed and proved agreeably to the laws and usages of the State of Virginia, in which the same purports to have been executed, and with a certificate of the only judge of said court

to the official character of said clerk, and that the attestation is in due form, and moves the court to admit the same to record.

And it appearing to the court that the said last will and
629 testament of Henry W. Kingsbury, deceased, was executed and proved agreeably to the laws and usages of the State of Virginia, in which the same was executed, and that the copy of said will and the probate thereof is duly certified according to the law of the State of Illinois, and that said will touches and concerns real estate and other property in the State of Illinois—

It is by the court ordered that the said will and proof thereof, certified as aforesaid, be recorded, and that the same be treated and considered as good and available in law in like manner as wills made and executed in this State.

10. The letters executory issued by the corporation court of the city of Alexandria, in the State of Virginia, which reads as follows, to wit:

STATE OF VIRGINIA, }
City of Alexandria, } *ss:*

Whereas H. W. Kingsbury, deceased, by his last will and testament did make, constitute, and ordain Gen'l Ambrose E. Burnside, of Rhode Island, and Capt. John Taylor, com. d'p't, U. S. Army, executors thereof, and at a corporation court held for the city of
630 Alexandria, Va., before the judge of said court, on the ninth day of May, in the year 1870, the said last will and testament was proved according to law, and at a corporation court for the city of Alexandria, Va., continued and held on the tenth day of May, in the year 1870, Ambrose E. Burnside, one of the said executors, having performed what the laws of this Commonwealth in that case require, certificate was granted him for obtaining a probate of the said will in due form:

Therefore, to the intent that the said will (a copy whereof is hereunto annexed) may be well and truly perform- —

I, E. M. Lowe, being the only judge of the said court, doth issue this probate and hereby authorize and empower the said Ambrose E. Burnside, executor as aforesaid, well and truly to collect and administer all and singular the goods, chattels, and credits of the said Henry W. Kingsbury, deceased, according to the true intent and meaning of the said will and according to law, hereby requiring the said executor to make and exhibit into the said corporation court a true and perfect inventory of the said goods, chattles, and credits, and also to make a just and true account of his actings and doings therein
631 when thereto lawfully required.

Given under my hand and the seal of the said court this tenth day of May, in the year 1870.

E. M. LOWE,
Judge Corporation Court of the City of Alexandria, Va.

Teste: MORTON MARYE,
Clerk of the Corporation Court of the City of Alexandria, Va.

Expecting soon to start upon a military expedition where death may overtake me, I leave this as a record of my wishes respecting the disposition of my property.

"To my mother, Jane C. Kingsbury, I leave twenty thousand dollars, or so much of my Chicago property as upon fair appr-isal may be valued at that amount.

"To my sister, Mary J. Buckner, I leave so much of the Chicago property held in my name as shall amount to one-third of the property in the city of Chicago, Ill., left by my father, Julius J. B. Kingsbury, deceased.

"To my cousin, John J. D. Kingsbury, I leave my property in Waterbury, Connecticut, and, in addition thereto, five thousand dollars, which I trust he will expend in completing his education.

632 "The remainder of my property of every description I leave to my devoted wife, Eva. I desire, moreover, that the provisions of this will may be carried out so that the yearly income of my wife for her own personal support shall never be less than two thousand dollars ($2,000).

"As executors I name Ambrose E. Burnside, of Rhode Island, and Capt. John Taylor, com. dep't, U. S. Army."

Signed at Fortress Monroe, Va., March 25th, 1862.

HENRY W. KINGSBURY,
First Lieutenant 5th Reg't Artillery, U. S. Army.

(A copy.)
Teste: MORTON MARYE,
Clerk of the Corporation Court of the City of Alexandria, Va.

11. The statutes of the State of Virginia. And it was stipulated and agreed that reference might be made to said statutes, printed by authority of the State, by either party, both in this court and the supreme court, the same as if they were copied at large in the record in this case.

12. A certified copy of an order from the county court of
633 Cook county, Illinois, entered July —, 1870, showing that the complainant in the original bill had taken and perfected an appeal from the order of July 11, 1870, offered in evidence heretofore.

13. A map of the city of Chicago.

14. The following deposition of Simon B. Buckner, together with the certified copy of the deed attached thereto from Simon B. Buckner and Mary K. Buckner to Henry W. Kingsbury, dated May 15th, 1861:

STATE OF ILLINOIS, } *ss:*
County of Cook, }

The People of the State of Illinois to George M. Davie, Esq., of the city of Louisville, county of Jefferson, State of Kentucky:

Whereas it has been represented to us that Simon B. Buckner is a material witness in a certain cause now depending in our circuit court of Cook county, in and for the county of Cook aforesaid, be-

tween Henry W. Kingsbury, by his next friend, Corydon Beckwith, complainant, and Ambrose E. Burnside and other defendants to the bill, and Mary K. Buckner and Simon B. Buckner, complain-
634 ants, and Henry W. Kingsbury and other defendants to the cross-bill, and that the said witness resides at Louisville aforesaid, without the said State of Illinois, and that his personal attendance cannot be procured at the trial of the said cause—

Now, know ye that we, in confidence of your prudence and fidelity, have appointed you commissioner to examine the said witness, and do therefore authorize and require — to cause the said witness to come before you at such time and place as you may therefore designate and appoint, and diligently to examine the said witness on the oath or affirmation of the said witness by you first duly in that behalf administered, and faithfully to take the deposition of the said witness upon all interrogatories inclosed with or attached to these presents, both on the part of the said plaintiffs and of the said defendants and none others, and the same, when thus taken, together with this commission and the said interrogatories, to certify unto our said circuit court of Cook county with the least possible delay.

635 Witness Norman T. Gassette, clerk of our said court, and seal thereof, in said county, this 29th day of November, A. D. 1870.

[L. S.] NORMAN T. GASSETTE, *Clerk.*

STATE OF ILLINOIS, } *ss:*
Cook County, }

In the Circuit Court of Cook County.

HENRY W. KINGSBURY, by His Next Friend, CORYDON BECKWITH, *vs.* AMBROSE E. BURNSIDE, JANE C. KINGSBURY, MARY J. Buckner, Simon B. Buckner, John J. D. Kingsbury, Eva Lawrence, and Albert G. Lawrence.	Bill of Complaint. In Chancery.
MARY K. BUCKNER and SIMON B. BUCKNER *vs.* HENRY W. KINGSBURY, EVA LAWRENCE, ALBERT G. LAWRENCE, and JANE C. KINGSBURY.	Cross-Bill. In Chancery.

To the complainant in said original bill and the defendants to said cross-bill of complaint and their solicitors:

Take notice that on the thirtieth day of November, A. D.
636 1870, at 10 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, the undersigned will sue out of the office of the clerk of the circuit court of the county of Cook aforesaid a *dedimus potestatum* or commission, under the seal of said court and directed to George M. Davie, Esq., of the city of Louisville, in the county of Jefferson and State of Kentucky, or

to any judge or justice of the peace of the county and State last above mentioned, to take the deposition of Simon B. Buckner upon the interrogatories hereto attached to be read in evidence on the part of the complainants in said cross-bill and defendants to said original bill on the hearing of the above-entitled cause, pending in the said circuit court on the chancery side thereof, when and where you can appear and file cross-interrogatories and join in said commission if you so wish.

Dated this twenty-second day of November, A. D. 1870.

GOUDY & CHANDLER,
Solicitors for said Complainants in said Cross-Bill, &c.

We hereby acknowledge service of the foregoing notice and
637 attached interrogatories by a copy thereof this twenty-second day of November, A. D. 1870, and consent that the commission may issue at the time named above, any longer notice being hereby waived.

B. F. AYER,
Attorney for Albert G. and Eva Lawrence.
C. BECKWITH,
Guardian ad Litem of Henry W. Kingsbury.

Interrogatories referred to in the foregoing notice and to be answered by Simon B. Buckner, a witness to be produced, sworn, and examined under and by virtue of the annexed commission, before George W. Davie, Esq., or any judge or justice of the peace of the county and State last mentioned in the within notice in the cause therein mentioned and referred to and now pending in the circuit court of Cook county, in the State of Illinois, wherein Henry W. Kingsbury is complainant in the original bill and Ambrose E. Burnside, Jane C. Kingsbury, Mary K. Buckner, Simon B. Buckner, John J. D. Kingsbury, Eva Lawrence, and Albert G. Lawrence are defendants thereto, and Mary K. Buckner and Simon B. Buckner
638 are complainants in the cross-bill, and Henry W. Kingsbury, Eva Lawrence, Albert G. Lawrence, and Jane C. Kingsbury are defendants thereto, on the part and behalf of said complainants in said cross-bill and defendants, Ambrose E. Burnside, Jane C. Kingsbury, Mary J. Buckner, Simon B. Buckner, and John J. D. Kingsbury, to said original bill, as follows, to wit:

Int. 1. What is — name, age, and place of residence? A.

Int. 2. Are you one of the defendants to the original bill and complainant in the cross-bill in this suit? A.

Int. 3. Are you acquainted with the other parties to this suit, or any of them; *A.* and, if so, how long have you known them respectively?

Int. 4. What relation, if any, do you bear to Mary K. Buckner, one of the complainants in said cross-bill, and when did that relation commence? A.

Int. 5. Were you or not acquainted with Julius J. B. Kingsbury in his lifetime; *A.* and, if yes, for how long before his death had you known him? A.

Int. 6. When did he die; *A.* and did he die testate or intestate? A.

639 Int. 7. State, if you know, what children the said Julius J. B. Kingsbury left him surviving at his death; *A.* and did he leave any descendants of children? A.

Int. 8. Were you or not acquainted with Henry W. Kingsbury, son of said Julius J. B. Kingsbury, in his lifetime; *A.* and, if yea, when did you first become acquainted with him and how intimately did you know him? A.

Int. 9. State whether or not prior to the death of said Julius J. B. Kingsbury you were in any manner connected with the management of his property in Chicago; *A.* and, if yea, state fully and particularly what such connection was and give a history thereof. A.

Int. 10. State whether or not you ever had at any time prior to his death any beneficial interest in any of said property or was the real owner thereof. A.

Int. 11. State the circumstances under which the deed dated January 22d, 1855, executed by Julius J. B. Kingsbury, conveying a strip of the so-called "Kingsbury tract," seventy feet in width, along the east bank of the Chicago river, to you was executed. A.

Int. 12. What, if anything, was the consideration of that conveyance? A.

640 Int. 13. State, if you know, what was the object of that conveyance. A.

Int. 14. State whether or not subsequently to the death of said Julius J. B. Kingsbury you were in any manner connected with the management of the property which he left in Chicago; and, if so, state particularly what that connection was and give a history thereof. A.

Int. 15. When did you cease to have the charge and management of said property? A.

Int. 16. After you ceased to have the direct charge and management of said property who succeeded you in the care thereof? A.

Int. 17. Under what arrangement did Ambrose E. Burnside take charge of said property; *A.* by whom made; *A.* and state fully the facts in regard thereto? A.

Int. 18. Where did you and your wife reside May 15, 1861? A.

Int. 19. Examine Exhibit A, attached to this commission, purporting to be a copy of a deed purporting to have been executed by yourself and said Mary K. Buckner, and state fully the circumstances under which the original deed of which said exhibit is a copy was executed. A.

641 Int. 20. Who prepared the same? A.

Int. 21. When and where was it executed? A.

Int. 22. Who were present? A.

Int. 23. Where was said Henry W. Kingsbury at the time of its execution? A.

Int. 24. How long prior to the time of its execution had you then last seen it; *A.* and when? A.

Int. 25. State whether or not you or said Mary K. Buckner had prior to the execution of said deed any understanding or arrange-

ment with the said Henry W. Kingsbury about the execution of said deed or in presence of which said deed was executed. A.

Int. 26. Had you or Mary K. Buckner any communication, either in person, by mail, or otherwise, with said Henry W. Kingsbury upon the subject of the execution of said deed to him prior to its execution; A. and, if yea, what communication? A.

Int. 27. What, if anything, was the consideration of said deed? A.

Int. 28. State whether or not any money or other consideration was paid to you or said Mary K. Buckner by said Henry W. Kingsbury or any other person for said deed? A.

642 Int. 29. Was there any bargain, sale, or gift of the premises described in said deed by you or your wife to Henry W. Kingsbury? A.

Int. 30. Where did said Henry W. Kingsbury first learn of the execution of said deed? A.

Int. 31. When did you next see him after the execution of said deed; A. and where? A.

Int. 32. When and where, if ever, did you first have any conversation with him about said deed, and state fully what was said? A.

Int. 33. Did you or not ever have any other conversation with him or make any other communication to or receive any other communication from him, either before or after the execution of said deed, in relation thereto? A. And if yea, state the same fully and when it occurred? A.

Int. 34. What was the cause, object, or intent of the execution of said deed by you? State the same fully. A.

Int. 35. State, if you know, what was the object, intent, and inducement of the execution of said deed by said Mary K. Buckner, and state what means of knowledge you had thereof at the time of said execution. A.

643 Int. 36. What, if anything, did you do with said deed after its execution? A.

Int. 37. Was it ever delivered to the said Henry W. Kingsbury? A.

Int. 38. What did you understand the value of the premises described in said deed, to wit, the undivided half of the Kingsbury tracts and lots 5 and 6, in block 35, original town of Chicago, was at time of the execution of said deed? A.

Int. 39. State what other property than that described in said deed, if any, the said Mary K. Buckner was possessed of at the time of the execution of said deed A. and what its value was. A.

Int. 40. State what other property, if any, the said Henry W. Kingsbury then had A. and its value. A.

Int. 41. State whether or not you were present when the said deed was signed and acknowledged by said Mary K. Buckner. A.

Int. 42. For how long a time prior to the execution of said deed had you entertained the intention or purpose which you sought to carry out by its execution? A.

Int. 43. What was the relation of yourself and Mrs. Buck-
644 ner with said Henry W. Kingsbury at the time of the execu-

tion of said deed, and what had there been prior thereto? A.

Int. 44. State whether or not after the execution of said deed said Henry W. Kingsbury made any claim to the premises described in said deed or exercised any acts of ownership over the same; and, if so, what claim or what acts. A.

Int. 45. What change, if any, took place in the management of said property or the manner in which the rents and profits thereof were disposed of upon or after the examination of said deed? A.

Int. 46. What part, if any, had the said Henry W. Kingsbury ever taken in the management of the said property to your knowledge prior to the 25th of March, 1862? A.

Int. 47. In what manner had the income derived therefrom, subsequent to the death of the said Julius J. B. Kingsbury and before March 25th, 1862, been disposed of? A.

Int. 48. Where and in what manner was the life of Henry W. Kingsbury passed? A.

Int. 49. Give the full name of Mrs. Buckner before her marriage. A.

645 Int. 50. When, from whom, and under what circumstances did you first learn that said Henry W. Kingsbury left any will or writing purporting to be his last will and testament? A.

Int. 51. State, if you know, to what congressional district said Henry W. Kingsbury was credited upon his appointment as a cadet at West Point. A.

Int. 52. If you know of anything further which would be of advantage to the complainants in the cross-bill and the defendants to the original bill of complaint in this cause, state the same fully. A.

Int. 53. State whether there was any child or children issue of your marriage with Mrs. Buckner; and, if yea, state when the same was or were born, and state whether the same is or are now living. A.

GOUDY & CHANDLER,
Solicitors, etc.

(Book 212 of Deeds, page 624.)

Be it known that Simon B. Buckner and Mary K. Buckner, his wife, of the city of Louisville and State of Kentucky, in consideration of the sum of one dollar in hand paid and the natural love and affection we bear to our brother, Henry W. Kingsbury, do

646 hereby grant, bargain, sell, and convey to said Henry W. Kingsbury, of the United States Army, his heirs and assigns forever, the following property, viz:

One undivided half of lots number- five (5) and six (6), in block number thirty-five (35), in the original town of Chicago, in the county of Cook and State of Illinois, and also all our right, title, and interest in the Kingsbury tract, so called, being the tract of thirty-five acres, more or less, purchased from James Kinzie by the late Major Julius J. B. Kingsbury, of the U. S. Army, as per deed of said Kinzie, on record in the clerk's office of Cook county, Illinois, the said tract being the south half of what remained of the

northwest quarter of section nine, in township thirty-nine, range fourteen, in said Cook county, Illinois, after deducting therefrom the town of Waubansia. The other interest in said land and tenements, etc., included in this deed now belongs to said Henry W. Kingsbury, as one of the heirs of the late Major J. B. Kingsbury, and the entire property being subject to the dower interest of *his* Jane C. Kingsbury:

To have and to hold the same to the said grantee, his heirs and assigns forever, the grantors covenanting that they will
647 warrant the property hereby conveyed.

In witness whereof we have hereunto set our hands and seals at Louisville this fifteenth day of May, 1861.

SIMON B. BUCKNER. [SEAL.]
MARY K. BUCKNER. [SEAL.]

STATE OF KENTUCKY, } ss:
County of Jefferson, }

Be it remembered that on this fifteenth day of May, A. D. 1861, before me, C. L. Thommason, a notary public in and for said State and county, duly commissioned and qualified, appeared Simon B. Buckner and Mary K. Buckner, his wife, who are personally known to me to be the persons who- names are subscribed to the foregoing deed as having executed the same, and acknowledged that they had executed the same for the uses and purposes therein expressed.

And the said Mary K. Buckner, wife of the said Simon B. Buckner, being of lawful age and having been by me, separate and apart from her said husband, examined and the contents of the said deed fully made known and explained to her, acknowledged that
648 she had executed the same and relinquished her dower to the lands and tenements therein mentioned voluntarily and without compulsion of her said husband.

In witness whereof I have hereunto set my hand and affixed my official seal this fifteenth day of May, A. D. 1861.

[SEAL.] C. S. THOMMASON,
Notary Public for Jefferson County, State of Kentucky.

No. 44987. Filed May 17th, 1861.

STATE OF ILLINOIS, } ss:
County of Cook. }

I, Norman T. Gassett, clerk of the circuit court and *ex officio* recorder in and for said county, in the State aforesaid, do hereby certify that the annexed is a true copy of the record of a certain instrument filed in my office on the 17th day of May, A. D. 1861, and recorded in Book No. 212 of Deeds, on page 624.

In testimony whereof I have hereunto set my hand and affixed the seal of our said court, at Chicago, this 23rd day of November, A. D. 1870.

[L. S.] NORMAN T. GASSETT,
Clerk of the Circuit Court and ex Officio Recorder of Cook County.

649 Counsel for Mrs. Eva Lawrence, one of the defendants to the original bill and to the cross-bill in this cause, object to direct interrogatories numbered 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, and 48, propounded to Simon B. Buckner, and to each of them severally, as immaterial and incompetent, and propose the following cross-interrogatories to be answered by the said witness:

Cross-interrogatory 1. Were you or not, at the time of the execution of the deed referred to in direct interrogatory 19, a citizen of the State of Kentucky? If yea, how long had you then been a citizen of that State? A.

Cross-int. 2. Did you at the time referred to in the preceeding cross-interrogatory hold any official position in the State of Kentucky? *A.* If yea, what position? *A.* And if you held more than one office, state what offices you held and for how long a term you had then held any such office or offices. A.

Cross-int. 3. Had you been at any time previous to the year 1861 connected with the United States Military Establishment?
650 *A.* If yea, state when, where, and how that connection first commenced, how long continued, what positions you held during that time in the Army of the United States, and when you retired from the Army. A.

Cross-int. 4. If you shall state in answer to cross-interrogatory 2 that you were the adjutant general of the State of Kentucky in May, 1861, state when you were appointed or elected to said office, *A.* by whom you were appointed or elected, and for how long a time you were chosen.

Cross-int. 5. Did you continue to hold and exercise said office of adjutant general until the expiration of the term for which you were chosen, or how otherwise? *A.* If not, when did you cease to officiate as such officer and what — the cause or inducement which led to your withdrawal from that service? A.

Cross-int. 6. Were you or not connected with the Confederate military service during the late civil war? *A.* If yea, when did you first enter that service and where? *A.* And how long did you remain connected with that service, what position did you occupy
651 during the war, and how and by whom or by what authority were you appointed to these positions? A.

Cross-int. 7. Did you or not in the spring or summer of 1861 visit the city of Washington? *A.* If yea, when did you arrive there, *A.* how long did you remain there or in that vicinity, *A.* and when did you return to the State of Kentucky?

Cross-int. 8. How long did you remain at your home in Louisville and how long within the Union lines, so called, after your return from Washington in the summer of 1861? *A.* And where did you — afterwards? *A.* Did you abandon your residence at Louisville? *A.* If yea, did your family, or any or what portion of it, accompany or follow you? A.

Cross-int. 9. Did you ever inform the late Henry W. Kingsbury of the purpose or object you had in view in the execution of the deed referred to in direct interrogatory 19? *A.* If so, when and where? A.

Cross-int. 10. When and where did you last see the said Henry W. Kingsbury?

Cross-int. 11. To whom did you ever communicate the in-
652 tention you sought to carry out by the execution of the deed above referred to at any time prior to the date of said deed? A. When and where was it that such intention was expressed? *A.* Did any one know that you entertained such an intention, so far as you are aware, before the deed was executed? *A.* If so, who, *A.* and how and when were they apprised of it? A.

Cross-int. 12. Did or not Mrs. Lawrence or some one in her behalf or otherwise, after the late Henry W. Kingsbury's death, send you information in relation to the writing executed by him at Fortress Monroe purporting to be of the nature of a last will and testament? *A.* If so, when and where did you receive that information? A.

Cross-int. 13. Where were you and your family at the time of the said Henry W. Kingsbury's death? *A.* Were there at that time any regular postal communication- between the place of Mrs. Lawrence's residence and the section of country where you were then? A.

Cross-int. 14. How long were such postal communications
653 interrupted, *A.* and when for the first time after the said Henry W. Kingsbury's death were you in a position to receive and send freely communications by post from and to Mrs. Lawrence? A.

Cross-int. 15. When and from where did you first receive a copy of the writing referred to in cross-interrogatory 12, *A.* and when and by whom were you first informed of the contents of said writing or its substance and purport? *A.* Where were you resident at that time, *A.* and have you or not since then continued to reside uninterruptedly in the United States? A.

Cross-int. 17. Please state specifically what portions, if any, of the real estate of the late Julius J. B. Kingsbury left by him at his decease were sold or disposed of by his legal representatives after his decease and prior to the death of his son, the late Henry W. Kingsbury. Please give the dates and particulars of all such alienations, including the names of purchasers the price received, and a general description of the property sold in each instance. A.

Cross-int. 18. Please state whether you or your wife have
654 received any portion of the proceeds of the sales inquired of in the previous cross-interrogatory. *A.* If yea, what sums have been so received by you or her and when were they so received? A.

B. F. AYER,
Solicitor for Eva Lawrence.

Cross-interrogations upon the part of the complainant- on the said cross-bill and the defendants (except Eva Lawrence and Albert G. Lawrence) to the original bill — to the new matter inquired about in the cross-interrogatories on the part of Eva Lawrence.

1. State the reason why you retired from the United States Army previous to the year 1861.

2. For how long a time before you entered the Confederate military service did you have any purpose or intention of so doing?

3. Had you any such intention at or before the time of the execution of the deed of May 15, 1861, to Henry W. Kingsbury?

4. State whether or not the condition of the country had any influence in the making of said deed of May 15th, 1861; and, if so, what.

5. State whether or not said deed was made with any view
655 of your entering the Confederate military service.

6. If your visit to Washington in the summer of 1861 had any reference to matters in controversy in this suit, you may state fully the facts in regard to the same.

7. How does the account between yourself and your wife or your wife and the estate of the late Henry W. Kingsbury stand, taking into consideration the proceeds of sales inquired about in cross-interrogatory on the part of the defendant, Eva Lawrence, and the rents and profits received from the property of the late Julius J. B. Kingsbury and the payments made by you or your wife or both?

8. If you know of any other matter of advantage to the complainants in the said cross-bill in this suit, state the same fully.

GOUDY & CHANDLER,
Solicitors, &c.

The deposition of Simon B. Buckner, of the county of Jefferson, State of Kentucky, a witness of lawful age, produced, sworn, and examined upon his corporal oath on the 15th day of December, in the year of our Lord eighteen hundred and seventy, at the office
656 of George M. Davie, in the city of Louisville, in the county and State aforesaid, by me, the said George M. Davie, a commissioner duly appointed by a *dedimus potestatem* or commission issued out of the clerk's office of the circuit court of Cook county, in the State of Illinois, bearing teste in the name of Norman T. Gassette, clerk of said circuit court, with the seal of said court affixed thereto, and to me directed as such commissioner, for the examination of the said S. B. Buckner, a witness in a certain suit and matter in controversy now pending and undecided in the said circuit court, wherein Henry W. Kingsbury, by his next friend, Corydon Beckwith, is plaintiff, and Ambrose E. Burnside, Mary J. Buckner, Simon B. Buckner, Jane C. Kingsbury, John J. D. Kingsbury, Eva Lawrence, and Albert G. Lawrence are defendants, in behalf of the said Mary J. Buckner and Simon B. Buckner, as well *as* upon the cross-interrogatories of Eva Lawrence as in the interrogatories of the said Mary K. Buckner and S. B. Buckner, and upon the cross-bill of the said Mary K. Buckner and Simon B. Buckner in said suit, complainants, against Henry W. Kingsbury, Eva Lawrence, Albert G. Lawrence, and
657 Jane C. Kingsbury, defendants to said cross-bill, in behalf of said complainants in said cross-bill, which were attached to and inclosed with the said commission, and upon none others.

The said S. B. BUCKNER, being first sworn by me as a witness in

the said cause, previous to the commencement of his examination, to testify the truth, as well on behalf of the plaintiff in the original bill as the defendants thereto, and as well on behalf of the defendants to the cross-bill as of the plaintiffs to the same, in relation to the matters in controversy between the said plaintiffs and defendants, so far as he should be interrogated, testified and deposed as follows:

Int. 1. What is your name, age, and residence?

Answer to Int. 1. My name is *is* Simon Bolivar Buckner; my age, 47 years; I reside in Louisville, Kentucky.

Int. 2. Are you one of the defendants to the original bill and a complainant in the cross-bill in this suit?

Answer to Int. 2. I am.

Int. 3. Are you acquainted with the other parties to this
658 suit or any of them; and, if so, how long have you known them respectively?

Answer. I am acquainted with Mary K. or J. Buckner, Jane C. Kingsbury, Ambrose E. Burnside, Eva Lawrence, and John J. D. Kingsbury. I have known the first and second named parties since 1844; the third named I have known since 1841; the fourth I have known since 1857 or 1858, and the fifth I have known since about 1858.

Int. 4. What relation, if any, do you bear to Mary K. Buckner, one of the complainants in said cross-bill, and when did that relation commence?

Answer. I am her husband. We were married May 2nd, 1850.

Int. 5. Were you or not acquainted with Julius J. B. Kingsbury in his lifetime; and, if yes, for how long before his death had you known him?

Answer. I was acquainted with him in his lifetime. I knew him for nearly twelve years previous to his death.

Int. 6. When — he die, and did he die testate or intestate?

Answer. He died in June, 1856. He died intestate.

Int. 7. State, if you know, what children the said Julius J. B. Kingsbury left him surviving at his death, and did he leave any descendants of children?

659 Answer to 7 interrogatory. He left a daughter, Mary J. Buckner, my wife, and a son, Henry W. Kingsbury, neither of whom had living descendants at the time of his death.

Int. 8. Were you or not acquainted with Henry W. Kingsbury, son of said Julius J. B. Kingsbury, in his lifetime; and, if yea, when did you first become acquainted with him and how intimately did you know him?

Answer to 8 interrogatory. I have known Henry W. Kingsbury from his early boyhood in 1844; our intimacy was that of an older and younger brother.

Int. 9. State whether or not, prior to the death of said Julius J. B. Kingsbury, you were in any manner connected with the management of his property in Chicago; and, if yea, state fully and particularly what such connection was, and give a history thereof.

Answer to 9 interrogatory. I was connected with the management

of his property in Chicago prior to his death. I was the agent for the management of his whole estate in Illinois, dating from March, 1855, under a general power of attorney, which was recorded in
660 the office of the recorder of deeds in Chicago, Illinois, the original — which was in my possession, but is now lost. Being on leave of absence from my military duties, and on a visit to my father-in-law's family, in Detroit, I accompanied Major J. B. Kingsbury, at his request, to Chicago. A few days after our arrival there, I think in January or February, 1855, he proposed to me to resign my commission in the United States Army and take charge, as his agent, of all his business in Chicago, offering me a salary as a compensation for relinquishing my position in the army. On his urgent and repeated solicitations I complied with his request, resigned my commission in the United States Army, and entered upon my duties as his agent in Chicago. The authority under which I acted was a full power of attorney from Major J. B. Kingsbury, authorizing leases, loans, and improvements on his property in Chicago.

Int. 10. State whether or not you ever had, at any time prior to his death, any beneficial interest in any of said property or was the real owner thereof.

661 Answer to Int. 10. I had no beneficial interest and was not the real owner of any of it.

Int. 11. State the circumstances under which the deed dated January 22d, 1855, executed by said Julius J. B. Kingsbury, conveying a strip of the so-called "Kingsbury tract," seventy-five feet in width along the east bank of the Chicago river, to you was executed.

Answer to Int. 11. A proposition was pending in the common council of Chicago to widen the North Branch of the Chicago river. It was supposed to be the intention of those who favored the proposition to require the river to be widened by cutting off a large part of the water front of Major Kingsbury'- property without granting compensation therefor. To meet what was thought to be an act of injustice, Major Kingsbury, under the advice of counsel, conveyed to me the entire water front of the "Kingsbury tract," so called, to the depth of seventy feet from the water line. I was a trustee only of this property, and it has always been my purpose to fulfill the trust by restoring this property at the proper time to the estate.

662 That property was conveyed to me by an absolute deed, with no reservation or trust expressed; but, in truth and honesty, it was for the benefit of Major Kingsbury and, if he should die, for his children. No writing was given by me declaring the trust, and the performance of the duty rested, without evidence, solely with my integrity. I had Major Kingsbury's confidence; he had my word. The deed I made in 1861 to Henry Kingsbury, although absolute on its face, was for the benefit of his sister, my wife, and by that very deed I fulfilled my word to Major Kingsbury, and executed the private trust by conveying to Henry Kingsbury the very property for which I held an absolute deed. His widow and heir now hold his interest in that property by — performance of a private trust, of which there was no evidence but my faith.

Int. 12. What, if anything, was the consideration of that conveyance?

Ans. to Int. 12. There was no consideration whatever except that stated in my answer to the 11th interrogatory.

Int. 13. State, if you know, what was the object of that conveyance.

663 Answer to Int. 13. I have fully answered this question in my answer to the 11th interrogatory. I refer to that answer as my answer to this.

Int. 14. State whether if not subsequent to the death of the said Julius J. B. Kingsbury you were in any manner connected with the management of the property which he left in Chicago; and, if so, state what that connection was and give a history thereof.

Answer to Int. 14. After the death of J. J. B. Kingsbury, in 1856, I continued to occupy the same relation as general agent for the management of his estate that I occupied towards him when living. It was the desire of his widow, of Henry W. Kingsbury, his son, and of my wife that I should so continue. No change, therefore, occurred in the management of the estate, but I continued to act as before with the full assent and at the request of Mrs. Jane C. Kingsbury and both of Major Kingsbury's children.

Int. 15. When did you cease to have the charge and management of said property?

664 Answer to Int. 15. I did not cease to have general control and management of the property in question until August or September, 1861, but before the termination of this agency there has been one or two changes in the mode of conducting the agency.

Int. 16. After you ceased to have direct charge and management of said property who succeeded you in the care thereof?

Answer to Int. 16. General Ambrose E. Burnside.

Int. 17. Under what management did Ambrose E. Burnside take charge of said property—by whom made? And state fully the facts in regard thereto.

Answer to Int. 17. In 1857 I resumed my residence in Kentucky. In consequence of my absence from Chicago much of the time, and of the fact that extensive improvements were in progress on the property, I procured the assistance of General Ambrose E. Burnside to supervise the business in my absence. From the summer or autumn of, I think, 1858 much of the business was conducted through

665 him. After the completition of these improvements it was thought that the income from the estate for one or two years might be insufficient to meet accrued and accruing liabilities. In consequence of this a more distinct arrangement was made with General Burnside—I think late in 1859 or early in 1860—in which it was stipulated that should there be any such deficiency the necessary sums were to be advanced by said Burnside until the supposed increase of its income would enable the estate to discharge its indebtedness to him. The particular details of this arrangement I do not recollect, but he was thereby thrown more closely in the business management of the estate, but I do [did] not consider my supervising control withdrawn. Henry W. Kingsbury and my wife,

represented by me, were parties to this arrangement. I believe Mrs. Jane C. Kingsbury also was, but I am not certain.

Int. 18. Where did you and your wife reside May 15th, 1861?

Answer to Int. 18. We reside in Louisville, Jefferson county, Kentucky.

Int. 19. Examine "Exhibit A" attached to this commission, purporting to be a copy of a deed purporting to have been exe-
666 cuted by yourself and said Mary K. Buckner, and state fully the circumstances under which the original deed, of which said exhibit is a copy, was executed.

Answer to Int. 19. I appeared to be the owner of a part of the property known as the "Kingsbury tract," on the Chicago river, by a deed made to me by Major Julius J. B. Kingsbury in his lifetime, but was in fact only a trustee for the heirs, and I had some interest as husband in the share of my wife in the property in Chicago, descended from her father, and I had intended for a long time before the deed marked "Exhibit A" was made to divest myself of all such interest for the benefit of my wife. The disturbed condition of the country and the uncertainty of future events in May, 1861, induced me to put in execution such intention at that time without further delay: I accordingly consulted with my wife and determined to convey her title and interest, together with the property or title held in my name, to her brother, with the view of having an undivided half of all the real estate situated in Chicago
667 and which formerly belonged to Major Kingsbury conveyed to my wife or in such way to give her the full control and benefit of all of her estate derived from her father free from any interest of mine. The deed was made in pursuance of such purpose and no other and with the full expectation that it would be accomplished in such way as might be directed by my wife. My wife and myself both had implicit confidence in her brother, and were on the most intimate and affectionate terms with him, and the idea that any advantage would be taken of the conveyance to him did not enter our minds.

There was no particular time or manner when and how the deed should be made by her brother discussed or fixed, because we were satisfied that my wife's interest would be safe in his hands, and that he would act in the proper way to please my wife. I consulted with Wm. F. Barrett, Esq., an attorney in Louisville, who was a particular friend, with regard to the matter, and he prepared the deed and was present, I think, when it was executed. This deed was
668 made at the time of its date at Louisville, Ky., and was sent by me to D. W. Mitchell, of Chicago, Ills., who was the agent in charge of the property, with directions to file the same for record. There was no personal delivery of the deed by me or my wife, unless the fact just stated was such a delivery. I do not mean to say there was any arrangement with my wife's brother in regard to my making said deed, but we were satisfied, from our knowledge of his character, that he would assent to any suggestion that might be made by my wife or myself with regard to her property. The troubled condition of the country was the occasion, not the cause,

of the conveyance. It had been contemplated and determined on long before, and the national troubles only reminded me of the delay in accomplishing a previous purpose. That purpose was that my wife should be solely beneficiary of her inheritance, and to accomplish that alone I made the conveyance. I was then owner of the lands in possession, lying in Hart county, Kentucky, worth fully forty thousand dollars. I did not convey them, because they were my own, my sole object being to insure my wife
669 her inheritance, and not to secure myself against any misfortune of the future. I likewise owned a residence in the city of Louisville worth more than twenty thousand dollars. That was not conveyed, because it was mine and constituted no part of what I conceived it to be my duty to my wife to convey. I also had lands in Minnesota worth five thousand dollars belonging to me in my own right. I did not convey that either, but retained it until after the war, when I sold part of it. I should have stated in answer to the eleventh interrogatory that I did not execute the private trust existing between Major Kingsbury and me sooner than May, 1861, because there was a suit in Chicago with reference to the bank of the Chicago river opposite to the trust property which I held, and which suit might affect the property I held, and I was advised by your legal counsel not to reconvey until the termination of that suit. I followed that advice until May, 1861, and then made the conveyance to Henry W. Kingsbury, determining to disengage myself from any interest in the estate of my wife and to execute any trust or duty I owed. I did not even let them know whether
670 that suit had been determined.

Int. 20. Who prepared the same?

Answer to Int. 20. William F. Barrett, of Louisville, Kentucky.

Int. 21. When and where was it executed?

Answer to Int. 21. In Louisville, Ky., May 15, 1861.

Int. 22. Who were present?

Answer to Int. 22. My wife and I and, I think, Mr. W. F. Barrett.

Int. 23. Where was said Henry W. Kingsbury at the time of the execution?

Answer to Int. 23. Either at the United States Military Academy, at West Point, New York, or in Washington city. I am not certain at which place.

Int. 24. How long prior to the time of the execution had you last seen him, and where?

Answer to Int. 24. I had last seen him at West Point; the exact time I do not remember; it was some months before the execution of the deed. I think not later than the previous December or January.

Int. 25. State whether or not you or said Mary K. Buckner had prior to the execution of said deed any understanding, arrangement, or agreement with said Henry W. Kingsbury about the exe-
671 cution of said deed or in pursuance of which said deed was executed?

Ans. to Int. 25. We had none.

Int. 26. Had you or said Mary K. Buckner any communication, either in person or mail or otherwise, with said Henry W. Kingsbury upon the subject of the execution of said deed to him prior to its execution; and, if yea, what communication?

Answer to Int. 26. I have no recollection of any whatever. I am sure there was none.

Int. 27. What, if anything, was the consideration of said deed?

Answer to Int. 27. There was no consideration for it.

Int. 28. State whether or not any money or other consideration was paid to you or said Mary K. Buckner by said Henry W. Kingsbury or any other person for said deed.

Answer to Int. 28. Nothing whatever was paid to either of us by any one.

Int. 29. Was there any bargain, sale, or gift of the premises described in said deed by you or your wife to Henry W. Kingsbury?

Answer to Int. 29. There was not.

Int. 30. When did said Henry W. Kingsbury first learn of the execution of said deed?

672 Answer to Int. 30. About the 7th or 8th of July, 1861, is the first time of his learning it, so far as I know and believe, and even then he did not learn from me the particulars of the transaction.

Int. 31. When did you next see him after the execution of said deed, and where?

Answer to Int. 31. I first saw him in Washington city on the evening of July 4th, 1861. I saw him there several times between that evening and about the 9th of the same month, when I left Washington city.

Int. 32. When and where, if ever, did you first have any conversation with him about said deed? And state fully what was said.

Answer to Int. 32. I met Henry W. Kingsbury in Washington city in July, 1861. I reached that place on the 4th of July of that year and left on or before the 9th of the same month. Henry was there in Washington or near there, on the staff of Gen'l McDowell, and I met him three or four times, I think, while I was there. There was nothing said about the property in Chicago at the first

673 or second interviews. At the third or fourth interview we were walking on the street near the President's House, and he was talking of the troubles in the country, when I remarked to him, "By the way, the property of your sister has been deeded to you and I want you to look after her interests and see that she has her property;" and he remarked, "That was all right or very well," or some words to that effect. This is the substance of the conversation. That was the only conversation I ever had with him on the subject, and I never met him after the deed was made except on that visit to Washington city.

Int. 33. Did you or not ever have any other conversation with him or make any other communication to or receive any other communication from him, either before or after the execution of said deed, in relation thereto? And, if yea, state the same fully and where it occurred.

Answer to Int. 33. None whatever, that I can remember.

Int. 34. What was the cause, object, and intent of the execution of said deed? State the same fully.

Answer to Int. 34. I have replied fully to this question in
674 my answer to interrogatories Nos. 11 and 19. I refer to those answers and make them my answers to this interrogatory.

Int. 35. State, if you know, what was the object, intent, and inducement of the execution of — said Mary K. Buckner, and state what means of knowledge you had thereof at the time of said execution.

Answer to Int. 35. They were the same that induced the execution of the deed by me, as stated in my replies to interrogatories Nos. 11 and 19. I know this from conversations with her at different times before the execution of the deed, some of which conversations occurred many months before the execution of the deed, and some, I think, two or three years before. There had been for some years a friendly contest between my wife and me with reference to her inheritance. Her wish was that I should have a larger interest than my martial [marital] rights gave me, and my wish was that she should be beneficiary of the estate descended from her father. I do not mean to say that my wife's desire to give a larger interest than I had as husband caused the del-y of a conveyance for her
675 sole benefit, because I believe that if at any moment I had been positive or mandatory she would have yielded; but I do say that as soon as she gave her willing consent, in May, 1861, I caused the conveyance to be made; and I further say that I would have insisted upon the consent sooner than May, 1861, had it not been for the embarrassments of the estate, one of which grew out of the effort to appropriate the river-bank property, to prevent which the deed of Major Kingsbury to me above referred to was made.

Int. 36. What, if anything, did you do with said deed after its execution?

Answer to Int. 36. I sent it to D. W. Mitchell, my agent for collecting rents of the estate in Chicago.

Int. 37. Was it ever delivered to the said Henry W. Kingsbury?

Answer to Int. 37. No.

Int. 38. What did you understand the value of the premises described in said deed, to wit, the undivided half of the Kingsbury tract and lots 5 and 6, block 35, original town of Chicago, was at the time of the execution of said deed?

676 Answer to Int. 38. I estimated the value of my wife's interest at about five hundred thousand dollars at that time.

Int. 39. State what other property than that described in said deed, if any, to the said Mary K. Buckner was possessed of at the time of the execution of said deed, and what its value was.

Answer to Int. 39. The only other property she owned was an undivided half of her father's property in Waterbury, Conne-ticut, subject to her mother's right of dower. Its estimated value was about three thousand or thirty-five hundred dollars. It yielded no income to her.

Int. 40. State what other property, if any, the said Henry W. Kingsbury then had, and its value.

Answer to Int. 40. He had only the remaining undivided half of his father's property in Waterbury, Conne-ticut, subject to his mother's right of dower. Its estimated value was about three thousand or thirty-five hundred dollars.

Int. 41. State whether or not you were present when the said deed was signed and acknowledged by the said Henry W. Buckner?

Answer to Int. 41. Yes; I was present.

677 Int. 42. For how long a time prior to the execution of said deed had you entertained the intention or purpose which you sought to carry out by its execution?

Answer to Int. 42. For several years.

Int. 43. What were the relations of yourself and Mrs. Buckner with the said Henry W. Kingsbury at the time of the execution of said deed, and what had they been prior thereto?

Answer to Int. 43. They were then and had ever been of the most confiding and affectionate character.

Int. 44. State whether or not, after the execution of said deed, said Henry W. Kingsbury made any claim to the premises described in said deed or exercised any acts of ownership over the same; and, if so, what claims and what acts?

Answer to Int. 44. He made no claim to them whatever that I know of or that I ever heard of, nor do I believe that he ever claimed them.

Int. 45. What change, if any, took place in the management of said property or the manner in which the rents and profits thereof were disposed of upon or after the execution of said deed?

678 Answer to Int. 45. None whatsoever that I know of during the lifetime of Henry W. Kingsbury until after August, 1861.

Int. 46. What part, if any, had the said Henry W. Kingsbury ever taken in the management of said property to your knowledge prior to the 25th of March, 1862?

Answer to Int. 46. None that I know of further than this: It was my custom, from regard and deference to him, to report in my occasional interviews with him every thing relating to our common interests and to undertake no important matter in relation thereto without his willing assent.

Int. 47. In what manner had the income derived therefrom subsequent to the death of said Julius J. B. Kingsbury and before March 25, 1862, been disposed of?

Answer to Int. 47. In the payment of taxes, assessments, legal expenses, attorneys' fees, agents, for improvements on the property, and in defraying expenses of Mrs. Jane C. Kingsbury, Henry W. Kingsbury, and my wife, and for other general purposes connected with the management of an estate.

Int. 48. Where and in what manner was the life of Henry W. Kingsbury passed?

679 Answer to interrogatory 48. From 1855 to the spring of 1861 either at school or as a cadet of the United States Military Academy. He remained at the Military Academy until after the outbreak of the war with the Southern States, when he was promoted into the army as a lieutenant. He was subsequently pro-

moted to higher grades, and remained in the army until his death, which I learned was in September, 1862.

Int. 49. Give the full name of Mrs. Buckner before her marriage.

Ans. to Int. 49. Her name was Mary Jane Kingsbury. After marriage it was her custom to drop her middle name and call herself Mary Kingsbury Buckner.

Int. 50. When, from whom, and under what circumstances did you first learn that said Henry W. Kingsbury left any will or writing purporting to be his last will and testament?

Answer to Int. 50. I first learned the fact late in the year 1866 or in January, 1867, under the following circumstances: During the summer and autumn of 1866 my wife was on a visit to her
680 mother in Connecticut. While on that visit she learned from her mother of a [the] probable existence of a will, and was informed by her that some time after the death of her son, Henry W. Kingsbury, she had written to Mr. Latrobe, of Baltimore, who she understood was the counsel of Mrs. Eva Kingsbury, to know what steps were being taken in regard to the estate in Chicago, and in reply to this inquiry Mr. Latrobe had sent her a copy of what purported to be the will of Henry W. Kingsbury. My wife received from her mother a copy of that paper and brought it with her to New Orleans, where we then resided. She reached New Orleans, I think, about the last day of December, 1866, and a few days or a very short time after her arrival she showed me a copy of the paper which her mother had received from Mr. Latrobe. I have since seen the original paper purporting to be the will of Henry W. Kingsbury, all of which was in the handwriting and signed by him, for I knew his handwriting well. The paper received by my wife was an accurate and exact copy of the original will.

Int. 51. State, if you know, to what congressional district
681 the said Henry W. Kingsbury was credited upon his appointment as a cadet at West Point.

Answer to Int. 51. To a congressional district in the State of New York of which the city of Brooklyn, or a part of the city — Brooklyn, formed a portion.

Int. 52. If you know anything further which would be of advantage to the complainants in the cross-bill of complaint in this cause, state the same fully.

Answer to Int. 52. Without refreshing my memory I cannot now recall any other facts which are material to the issues involved in this controversy.

Int. 53. State whether there was any child or children, issues of your marriage with Mrs. Buckner; and, if yea, state when the same were born, and state whether the same is or are now living.

Answer to Int. 53. There were two children, the issues of our marriage; the first a daughter, "Lilly Buckner," born March 7th, 1858, and now living; the second, a son, Henry Kingsbury Buckner, born February 9th, 1862.

Counsel for Mrs. Eva Lawrence, one of the defendants to the
682 original bill and to the cross-bill in this cause, object to the

direct interrogatories numbered 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, and 48, propounded to Simon B. Buckner, and to each of them severally, as immaterial and incompetent, and propose the following cross-interrogatories to be answered by said witness:

Cross-int. 1. Were you or not, at the time of the execution of the deed referred to in direct interrogatory 19, a citizen of the State of Kentucky? If yea, how long had you then been a citizen of that State?

Answer to cross-int. 1. Yes; I was a citizen of Kentucky at that time. I am a native of the State, and, with the exception of a temporary residence in Illinois, has [have] always regarded myself as a citizen of Kentucky. My citizenship was last resumed in the State in October, 1857, at which time I located in Jefferson county, Kentucky.

Since that date I have always claimed to be a citizen, though much of the time residing elsewhere.

Cross-int. 2. Did you at the time referred to in the preceeding cross-interrogatory hold any official position in the State of Kentucky; if yea, what position? And, if you held more than one office,
683 state what offices you held and for how long a time you had then held any such office or offices.

Answer to cross-int. 2. Yes; I held the office of inspector general of Kentucky. That was the only office I held. I had held that office nearly a year.

Cross-Int. 3. Had you been at any time previous to the year 1861 connected with the United States military establishment? If yea, state when, where, and how that connection first commenced, how long it continued, what positions you held during that time in the Army of the United States, and when you retired from the army.

Ans. to X int. 3. Yes; my connection first commenced as a cadet in the year 1840. I was transferred, on graduating, at the Military Academy, in 1844, as brevet 2d lieutenant, to the 2d regiment of infantry. I was subsequently promoted 2d lieutenant in the 6th infantry, and served through the Mexican war in that capacity. For services in that war I was promoted as brevet 1st lieutenant and brevet captain. In 1851 I was promoted as 1st lieutenant in the line. In 1852 I was appointed by selection a cap-
684 tain in the general staff. I held both my line and staff commissions until about the last of March, 1855, when I resigned them.

Cross-int. 4. If you shall state in answer to cross-interrogatory 2 that you were the adjutant general of the State of Kentucky in May, 1861, state when you were appointed or elected to said office, by whom you were appointed or elected, and for how long a term you were chosen.

Answer to cross-int. 4. This question seems to have been asked under a misapprehension. I was not adjutant general, but inspector general, as I have previously stated; the first-named office was held by another gentleman. On the passage of the militia law, in

the spring of 1860, the office was tendered to me by the Governor of Kentucky, and was declined by me; but when he renewed the tender, accompanied by a special request that I should aid him in the organization of the militia of the State, I accepted the appointment from the Governor of Kentucky, in whom was vested by law the power of appointment. The law did not limit the duration of the appointment.

Cross-int. 5. Did you continue to hold and exercise said
685 office of adjutant general until the expiration of the term for which you were chosen, or how otherwise? If not, when did you cease to officiate as such officer and what — the cause or inducement which led to your withdrawal from that service?

Answer to cross-int. 5. As previously stated, the law did not fix the term of the office which I held; but early in 1861 an amendment was passed to the law requiring the confirmation of the senate of all the appointments of the general officers of the militia. On the passage of this act I resigned the office of inspector general, but very soon thereafter was renominated for the office by the Governor and confirmed by a unanimous vote of the senate of Kentucky. It was my purpose then to retire from the position, but at the solicitation of gentlemen of all parties in the State I continued to hold the office. The cause which ultimately led to my resigning the office was the adoption of subsequent legislation which, in my opinion, so divided the duties which had previously belonged to the inspector general among different offices that I considered my holding the position any longer could result in no public benefit.
686 I think this legislation took place in June, 1861. As I did not see any obligation resting upon me to hold the office any longer, I then announced my purpose to resign it, but at the instance of the Governor of the State, and at the request of the Hon. John J. Crittenden, I consented to hold the office for a short time, until I could accomplish a duty which both of the gentlemen expressly desired me to perform. This duty was to confer with the President of the United States on the then existing state of public affairs in Kentucky. I was accredited to the President by an official letter from the Governor of Kentucky, stating the objects for which I had been ordered to Washington. I went to Washington city under the orders of the Governor and in the company of Hon. J. J. Crittenden, who had seen my instructions and knew fully of the objects of the visit and fully approved of its purposes. I had two interviews with the President, of a pleasant and satisfactory character, and at both of which Mr. Crittenden was present. The first interview was on the 5th or 6th of July, 1861; the second was, by appointment of the President, two days subsequently.
687 Shortly after these interviews I returned to Kentucky, made my report to the Governor of the State, and in pursuance of the resolutions previously formed and announced, both to the Governor and the President, resigned the office of inspector general. It was on or about the 18th of July, 1861, that I resigned the office.

Cross-int. 6. Were you or not connected with the Confederate military service during the late civil war? If yea, when did you

first enter that service? What positions did you occupy during the war, and how, and by whom, and by what authority were you appointed to those positions?

Answer to cross-int. 6. I was. I entered that service on the 16th of September, 1861, in Nashville, Tennessee. I remained in that service until the close of the war, in May, 1865. I held, successively, the positions of brigadier general, major general, and lieutenant general, under commissions issued under authority of the president of the Confederate States.

Cross-int. 7. Did you or not in the spring or summer of 1861 visit the city of Washington? If yea, when did you arrive there, how long did you remain there or in that vicinity, and when did
688 you return to the State of Kentucky?

A. to cross-int. 7. I did, as previously stated in my response to cross-interrogatory No. 5, which I make part of this answer. I reached here on the 4th of July, 1861. I remained until the 8th or 9th of the same month, being all the time within the city limits of Washington city. I left Washington city by the Baltimore train on the 8th or 9th of July, 1861, and arrived in New York city the following day. After transacting some business there and paying a brief visit to my wife's mother in Connecticut I returned to my home in Louisville, Ky., about the 15th or 16th of July, 1861.

Cross-int. 8. How long did you remain at your home in Louisville and how long within the "Union lines," so called, after your return from Washington in the summer of 1861, and where did you go afterwards? Did you abandon your residence at Louisville? If yea, did your family or any and what portion of it accompany or follow you?

Answer to cross-int. 8. I remained at my home in Louisville, Ky., until the latter part of August, 1861, with the exception of two
689 visits paid my mother, who resided on my farm in Hart county, Kentucky, about 70 miles south of Louisville. Late in August, the exact date not remembered, I went South, intending to return in a week or two. I did not abandon my residence at Louisville, but I left my family in it, intending to return in a week or two, and on my return to lease my residence in Louisville and to remove either to Elizabethtown, Kentucky, where my mother owned a residence, or to my farm, which she then occupied. With this expectation I stopped on my way South to see my mother on the subject. After the 12th of September, 1861, I sent word to my wife to join me at Nashville. I met her at the Kentucky and Tennessee boundary line on the evening of the 16 of September, 1861.

Cross-int. 9. Did you ever inform the late Henry W. Kingsbury of the purpose or object you had in view in the execution of the deed referred to in direct interrogatory 19; if so, when and where?

Answer to cross-int. 9. I had but one conversation with Henry W. Kingsbury on the subject, which is fully related, as I recollect
690 it, in my reply to direct interrogatory No. 32, and in that answer, which I make part of this, I have stated all that was said by either of us on the subject, as far as I recollect.

Cross-int. 10. When and where did you last see the said Henry W. Kingsbury?

Answer to cross-int. 10. About the 8th of July, 1861, in Washington city.

Cross-int. 11. To whom did you ever communicate the intention you sought to carry out by the execution of the deed above referred to at any time prior to the date of said deed? When and where was it that such intention was expressed? Did any one know that you entertained such an intention, so far as you are aware, before the deed was executed; if so, who and how and when were they apprised of it?

Answer to cross-int. 11. The general objects I had in view were made known to my attorney and confidential friend, William F. Barrett, of Louisville, Kentucky. He knew my intentions from conversations held with me prior to the execution of the deed; the exact time of those conversations I do not now remember, but
691 there were several of them during the spring of 1861, *and* in Louisville, Kentucky, and I held frequent conversations on the subject with my wife, as I have previously stated in my answer to the 32d direct interrogatory, which I make part of this answer. Some of my conversations with her in regard to it were a year or two before the execution of the deed.

Cross-int. 12. Did or not Mrs. Lawrence, or some one in her behalf, or otherwise, after the late Henry W. Kingsbury's death, send you information in relation to the writing executed by him at Fortress Monroe, purporting to be of the nature of a last will and testament; if so, when and where did you receive that information?

Answer to cross-int. 12. I did not receive from Mrs. Lawrence or any one in her behalf, as far as I recollect, any information in relation to the writing referred to after the death of Henry W. Kingsbury. The manner in which I first received that information has been stated in a previous reply, viz., from my wife, about the last of December, 1866, or early in January, 1867, in New Orleans, my wife having received the information from her mother, and her
692 mother having received it in reply to an inquiry made by her from Mr. Latrobe, of Baltimore. This is the first time, so far as I can remember, that I received any information in regard to the will.

Cross-int. 13. Where were you and your family at the time of the said Henry W. Kingsbury's death? Were there at that time any regular postal communications between the place of Mrs. Lawrence's residence and the section of country where you then were?

Answer to cross-int. 13. At the time alluded to I was with the Confederate army, in Kentucky, in the vicinity of Green River; my family were in Marietta, Georgia. About a month elapsed before the postal communication on the part of the United States could be re-established with the locality where I then temporarily was, and several years before they were re-established with the place where my family then were. I can state, though the question is not distinctly asked, that we were only temporarily in those localities, and that during the subsequent continuance of the war we were

in other localities to which the postal arrangements of the United States did not extend, though the postal arrangements of
693 the Confederate government were nearly all the time in operation.

Cross-int. 14. How long were such postal communications interrupted, and when for the first time after the said Henry W. Kingsbury's death were you in a position to receive and send freely communications by post from and to Mrs. Lawrence?

Answer to cross-int. 14. The United States postal communications with the localities where we were were suspended until May or June, 1865, when for the first time after the death of Henry W. Kingsbury I was in position to receive communications from Mrs. Lawrence or send communications to her through the United States Post Office Department.

Cross-int. 15. When and from whom did you first receive a copy of the writing referred to in cross-interrogatory 12, and when and by whom were you first informed of the contents of the said writing or its substance and purport? Where were you residing at that time, and have you or not since then continued to reside uninterruptedly in the United States?

Answer to cross-int. 15. I have stated in my reply to direct
694 interrogatory No. 50 my answer to this question. I refer to that for my answer. I was then residing in New Orleans, and have since continued to reside in the United States.

Cross-int. 16. Where have you resided since the close of the late civil war?

Answer to cross-int. 16. Under the terms of the military convention by which the forces I commanded were surrendered, I could not return to Kentucky, which I still regard as my home. I therefore resided in New Orleans until after these restrictions of the convention were removed, soon after which I returned to Kentucky, and I have been residing in that State since about June 1st, 1868. The first time I returned to Ky. after the war was in February or March, 1868, at which time I engaged the services of counsel in behalf of my wife in this suit now pending.

Cross-int. 17. Please state specifically what portions, if any, of the real estate of the said Julius J. B. Kingsbury left by him at his decease were sold or disposed of by his legal representative after his decease and prior to the death of his son, the late Henry W.
695 Kingsbury. Please give the dates and particulars of all such alienations, including the names of the purchasers, the price received, and a general description of the property sold in each instance.

Answer to cross-int. 17. I remember the sale of two pieces of his property, a body of farming land known as the "Caldwell reservation," six or eight miles from Chicago, and a strip from the northern portion of the "Kingsbury tract," in Chicago. The first was sold to John Rogers, the second to S. L. Baker. I have no memoranda now in my possession to enable me to give exact dates of the transaction. In reference to the sale to John Rogers, I remember these facts: In 1855 Rogers held a lease for a term of years of the whole of the

"Kingsbury tract," for which he paid what was considered then a nominal rent.

In 1854 a person named Cook rented from Rogers a small part of this tract, for which he stipulated a payment much larger than Rogers paid for the entire tract. Major Kingsbury had advanced money to Cook for the purpose of putting up an extensive manufacturing establishment on the grounds which Cook had
696 rented from Rogers. Cook failed in business and Major Kingsbury was compelled to take possession of the property, and then he became a tenant of his own tenant, and was placed under obligations to pay his tenant a much larger sum for a small part of the premises than he himself received from that tenant for the whole tract. It was to make an arrangement with reference to these leases and at the same time to place substantial improvements on the "Kingsbury tract" that the sale was made to Rogers. I think the property was sold to him for about seven thousand dollars, but I do not remember the exact amount. The property was paid for by some arrangement with reference to this lease by the erection by Rogers of a brick building for the estate on the corner of Kingsbury and Kinzie streets, and, I think, by work done—either in deepening the channel front of the wharves or in building new wharves, I am not certain which. With reference to the sale to Baker, the estate was already much indebted to him under an arrangement made by Major Kingsbury, whereby Baker had from time to time advanced to counsel and for other purposes
697 of the estate, both before and after the death of Major Kingsbury, a good many thousands of dollars. I think the amount of this sale was $25,000 or $30,000. No money was received by me for this property except as specified above, and a considerable portion of it remained unpaid at the time I went South.

Cross-int. 18. Please state whether you or your wife have received any portions of the proceeds of the sales inquired of in the preceeding cross-interrogatory. If yea, what sums have been so received by you or her and when were they so received?

Answer to cross-int. 18. We have not, unless the sums which from time to time we drew from the estate for current expenses could be considered as part of what had been paid on this property, and, on this subject, I will state that there was no time during my administration of the affairs of the estate when the estate was not indebted to me, either for compensation due me under the arrangement with Major Kingsbury or for money advanced by me to the estate at different times.

Cross-interrogatories upon the part of the complainants in the
698 said cross-bill and the defendants (except Eva Lawrence and Albert G. Lawrence) to the original bill to the new matter enquired about in the cross-interrogatories on the part of Eva Lawrence.

Interrogatory 1. State the reason why you retired from the United States Army prior to the year 1861.

Answer to Int. 1. It was to take charge of the property of Major Kingsbury in Chicago, Illinois, at his repeated solicitations and under a specific arrangement made with him with that view.

Int. 2. For how long a time before you entered the Confederate military — did you have any purpose or intention of so doing?

Answer to Int. 2. For about four or five days. My purpose was formed on the 11th or 12th of September, 1861, while in Tennessee. A position in the Confederate army had previously been tendered me about the last of August of [or] first of September of the same year, but I then promptly declined. I was in Nashville, Tennessee, returning to Louisville, Kentucky, when I formed my resolu-
699 tion for the first time, on the 11th or 12th of September, 1861, and I immediately tendered my services by telegraph to the Confederate government, as before stated. I received information of the acceptance of my services about the 16th of the same month. I should add that on the previous day, but subsequent to the tender of my services, General Albert Snyder Johnson appointed me to a command, subject to the approval of the Confederate government.

Int. 3. Had you any such intention at or before the time of the execution of the deed of May 15, 1861, to Henry W. Kingsbury?

Answer to Int. 3. I had not.

Int. 4. State whether or not the condition of the country had any influence in the making of said deed of May 15, 1861. And, if so, what?

Answer to Int. 4. As far as the disposition of my own property was concerned, whether derived from inheritance or obtained by purchase, it exercised no influence on my action; but, as I have already fully stated, the disturbed condition of the country was the occasion, but not the cause, of my making that deed.

Int. 5. State whether or not said deed was made with any
700 view of your entering the Confederate military service.

Answer to Int. 5. It was not. On the contrary, it was my purpose to avoid all participation in the war, and it was my expectation then and for a long time afterwards—in fact, until about the 12th of September, 1861—not to take part in it.

Int. 6. If your visit to Washington in the summer of 1861 had any reference to matters in controversy in this suit you may state fully the facts in regard to the same.

Answer to Int. 6. It had none whatever. The sole object of my visit, as previously stated, was in obedience to the orders of the Governor of Kentucky to represent to the President of the United States the condition of affairs in Kentucky, and to obtain his view on the same; but for these orders I would not then have gone there. But, being in Washington, I once or twice visited the camp of General Burnside, then in the limits of Washington city, not far from the Soldiers' Home, to see him in reference to some business of the estate. A note on which I had raised money for the estate of Major Kingsbury, and which General Burnside was to have protected
701 under the arrangement made with him, had gone to protest, and I had recently paid it from my own means. It was on this subject that I went to see him. Some other business of the

estate, I do not distinctly remember what, induced me to return home by way of New York city; but attention to this business was only an incident of the journey and had no part in causing it.

Int. 7. How does the account between yourself, or yourself and your wife, or your wife and the estate of the late Henry W. Kingsbury, stand, taking into consideration the proceeds of sales enquired about in cross-interrogatories on the part of the defendant, Eva Lawrence, and the rents and profits received from the property of the late Julius J. B. Kingsbury and the payments made by — your wife or both?

Answer to Int. 7. The compensation I was to receive from Major Kingsbury was $3,500 per year. It was the proposition of Henry W. Kingsbury, subsequent to his father's death, to fix it at $4,000 per year, but I declined it. I advanced at one time to the estate upwards
of $9,000, lent me by my mother, and at another time about
702 $6,000, obtained from the same source. Since my mother's death I have paid to my sister her half of the above sums. At other times I advanced to the estate about $10,000 of money raised on my endorsement in Louisville, Kentucky. Money was drawn by me from the estate to meet part of these payments, but an equitable adjustment of my accounts with the estate would leave a balance in my favor of not less than $10,000 or perhaps $15,000. My wife drew no money from the estate except through me, and I have considered in my estimate all that was drawn from the estate, both for her and for me.

Int. 8. If you know of any other matter of advantage to the complainants in said cross-bill in this suit state the same fully.

Answer to Int. 8. I do not remember any other facts material to the issues involved.

S. B. BUCKNER.

703 I, George M. Davie, of the county of Jefferson and State of Kentucky, a commissioner duly appointed to take the deposition of the said Simon B. Buckner, a witness whose name is subscribed to the foregoing deposition, do hereby certify that previous to the commencement of the examination of the said Simon B. Buckner as a witness in the suit between the said Henry W. Kingsbury, complainant in the original bill, and Ambrose E. Burnside, Jane C. Kingsbury, Mary J. Buckner, Simon B. Buckner, John J. D. Kingsbury, Eva Lawrence, and Albert G. Lawrence, defendants thereto, and Mary K. Buckner and Simon B. Buckner, complainants in the cross-bill, and Henry W. Kingsbury, Eva Lawrence, Albert G. Lawrence, and Jane C. Kingsbury, defendants thereto, he was duly sworn by me as such commissioner to testify the truth in relation to the matter in controversy between the said Henry W. Kingsbury, complainant in the original bill, and Ambrose E. Burnside, Jane C. Kingsbury, Mary J. Buckner, Simon B. Buckner, John J. D. Kingsbury, Eva Lawrence, and Albert G. Lawrence, defendants, and Mary K. Buckner, and Simon B. Buckner, complainants, in the
cross-bill, and Henry W. Kingsbury, Eva Lawrence, Albert
704 G. Lawrence, and Jane C. Kingsbury, defendants, so far as he

should be interrogated concerning the same, and that the said deposition was taken at my office, at the city of Louisville, in the county of Jefferson and State of Kentucky, on the fifteenth day of December, A. D. 1870, and that after said deposition was taken by me the interrogatories and answers thereto as written down were read over to the said witness, and that thereupon the same was signed and sworn to by the said deponent, Simon B. Buckner, before me, the oath being administered by me as such commissioner at the place and on the day and year last aforesaid.

I further certify that all the interlineations and erasures in the foregoing deposition were made by me at the instance and request of the said Simon B. Buckner before his signing of the same.

GEO. M. DAVIE,
Commissioner.

705 The following deposition of Wm. F. Barrett, to wit:

STATE OF ILLINOIS, }
Cook County, } *ss:*

In the Circuit Court of Cook County.

HENRY W. KINGSBURY, by His Next Friend, CORYDON BECKWITH, *vs.* AMBROSE E. BURNSIDE, JANE C. KINGSBURY, Mary J. Buckner, Simon B. Buckner, John J. D. Kingsbury, Eva Lawrence, and Albert G. Lawrence.	Bill of Complaint. In Chancery.
MARY K. BUCKNER and SIMON B. BUCKNER *vs.* HENRY W. KINGSBURY, EVA LAWRENCE, Albert G. Lawrence, and Jane C. Kingsbury.	Cross-Bill. In Chancery.

To the complainant in said original bill of complaint and the defendants in said cross-bill and their solicitors:

Take notice that on the fourteenth day of December, A. D. 1870, at ten o'clock in the forenoon of said day, or as soon thereafter
706 as counsel can be heard, the undersigned will sue out of the office of the clerk of the circuit court of the county of Cook aforesaid a *dedimus protestatem* or commission under the seal of said court and directed to George M. Davie, Esq., of the city of Louisville, in the county of Jefferson and State of Kentucky, or to any judge or justice of the peace of the county and State last above mentioned, to take the deposition of Wm. F. Barrett upon the interrogatories hereto attached, to be read in evidence on the part of the complainants in said cross-bill and defendants to said original bill on the hearing of the above-entitled cause, now pending in the said circuit court on the chancery side thereof, when and where you can appear

and file cross-interrogatories and join in said commission if you so wish.

Dated this fifth day of December, A. D. 1870.

GOUDY & CHANDLER,
Solicitors for said Complainants in said Cross-Bill, etc.

We hereby acknowledge service of the foregoing notice and attached interrogatories by a copy thereof this fifth day of December, A. D. 1870, and consent that the commission may issue at the time named above, longer notice being hereby waived.

B. F. AYER,
Solicitor for Eva Lawrence and Albert G. Lawrence.
C. BECKWITH,
Guardian ad Litem for Henry W. Kingsbury.
JAMES E. MONROE,
Of Counsel for Jane C. Kingsbury.

Interrogatories referred to in the foregoing notice and to be answered by William F. Barrett, a witness to be produced, sworn, and examined under and by virtue of the annexed commission, before George M. Davie, Esq., or any judge or justice of the peace in the county or State last mentioned in the within notice, in the cause therein mentioned and referred to and now pending in the circuit court of Cook county, Illinois, in chancery, wherein Henry W. Kingsbury is complainant in the original bill of complaint and Ambrose E. Burnside, Jane C. Kingsbury, Mary J. Buckner, Simon B. Buckner, John J. D. Kingsbury, Eva Lawrence, and Albert G. Lawrence are defendants thereto, and wherein Mary K. Buckner and Simon B. Buckner are complainants in the cross-bill and Henry W. Kingsbury, Eva Lawrence, Albert G. Lawrence, and Jane C. Kingsbury are defendants thereto, on the part and behalf of said complainants in said cross-bill and the defendants, Ambrose E. Burnside, Jane C. Kingsbury, Mary J. Buckner, Simon B. Buckner, and John J. D. Kingsbury, to said original bill, as follows, to wit:

1. What is your name, age, residence, and occupation?

2. Are you acquainted with Mrs. Mary K. Buckner and Simon B. Buckner, parties in this suit; and, if yea, how long have you known them?

3. State, if you can, who prepared a deed, dated May 15, 1861, executed by said Mary K. Buckner and Simon B. Buckner to Henry W. Kingsbury, purporting to convey lots 5 and 6, block 35, original town of Chicago, Illinois, and a tract of land in the city of Chicago known as the "Kingsbury tract," formerly owned by the father of Mrs. Buckner.

4. Was you present when it was signed by the parties, respectively? And, if yea, state all the persons present.

5. Was you present when said deed was acknowledged? And, if yea, state all the persons present. Was the husband of Mrs. Buckner present when it was acknowledged by her? Was

she examined separate and apart from her husband? Did the officer who tookthe acknowledgment explain to Mrs. Buckner the contents and meaning of the deed?

6. Where was Henry W. Kingsbury, mentioned as the grantee, when said deed was signed and acknowledged?

7. Who requested or directed you to prepare the deed?

8. Did you have any conversation with Mrs. Buckner before the deed was prepared or signed by her husband?

9. Where was her husband when you first had an interview with her? Did she sign the deed at that time? Did you advise her to sign it or not sign it at that time? By whom was the presence of her husband procured when the deed was signed by Mrs. Buckner?

10. What, if anything, was the consideration for said deed?

710 11. Why was said deed made? And give the source of your information as to the truth of the statements you make.

12. Where was Simon B. Buckner on the 20th, 21st, and 22d days of July, 1861? State your means of knowledge.

13. Was said deed mentioned in the third interrogatory executed to enable General Buckner to go into the Confederate army? Was there any purpose or intention by General Buckner, on or before May 15, 1861, to enter the rebel army? And, if you answer no, state your means of knowledge.

14. State any other facts material in this suit of benefit to the complainants in the cross-bill and within your knowledge.

GOUDY & CHANDLER,
Solicitors for said Complainants in said Cross-Bill, etc., etc.

Council [counsel] for Mrs. Eva Lawrence, one of the defendants, object to direct interrogatories numbered 5, 8, 9, 10, 11, 12, and 13, propounded to William F. Barrett, and to each of said interrogatories, as immaterial and inconsistent [incompetent], and pro-

711 pose the following cross-interrogatories to be answered by said witness:

Cross-interrogatory 1. When and before whom was the said deed referred to in the third direct interrogatory acknowledged by Mrs. Buckner?

Cross-int. 2. Where was the said deed acknowledged, and if you were present why did you attend the parties on that occasion?

Cross-int. 3. What was done with the deed after it was executed and acknowledged?

Cross-int. 4. Was or not General Buckner an avowed opponent of the coercive policy which had been adopted by the national administration towards the States in insurrection on the 15th day of May, 1861?

Cross-int. 5. Was or not Gen. Buckner, on the 15th day of May, 1861, openly opposed to aid being rendered by the State of Kentucky to the national administration in its efforts to suppress the rebellion by force of arms?

Cross-int. 6. Was or not General Buckner, on the 15th of May, 1861, opposed in sentiment to any effort being made to suppress the rebellion by military force?

Cross-int. 7. To what political party in the State of Ken-
712 tucky did Gen. Buckner belong on the 15th day of May, 1861?

Cross-int. 8. Can you state on your own knowledge that Gen. Buckner did not, on the 15th day of May, 1861, have some idea that he might engage in the service of the Confederate government?

Cross-int. 9. Did Gen. Buckner take an active part in the public affairs in the State of Kentucky after the inauguration of President Lincoln on the 4th of March, 1861, down to the time he joined the Confederate army?

Cross-int. 10. Was his conduct and course of action as a public man of a uniform and consistent tenor between March 4, 1861, and the time he left Louisville to join the Southern Confederacy? If he changed his opinions or his position in regard to public questions during that interval, when did that change occur?

B. F. AYER,
Of Counsel for Eva Lawrence.

The deposition of William F. Barrett, of the county of Jefferson, State of Kentucky, a witness of lawful age, produced, sworn, and
713 examined upon his corporal oath, on the sixteenth day of December, in the year of our Lord eighteen hundred and seventy, at the office of George M. Davie, in the city of Louisville, in the county aforesaid, by me, the said George M. Davie, a commissioner duly appointed by a *dedimus prrotestatem* or commission, issued out of the clerk's office of the circuit court of Cook county, in the State of Illinois, bearing teste in the name of Norman T. Gassett, clerk of said circuit court, with the seal of said court affixed thereto, and to me directed as such commissioner, for the examination of said William F. Barrett, a witness in a certain suit and matter in controversy now pending and undetermined in the said circuit court, wherein Henry W. Kingsbury, by his next friend, Corydon Beckwith, is plaintiff and Ambrose E. Burnside, Mary J. Buckner, Simon B. Buckner, Jane C. Kingsbury, John J. D. Kingsbury, Eva Lawrence, and Albert G. Lawrence and [are] defendants, in behalf of the said Mary J. Buckner and Simon B. Buckner, as well *as* upon the cross-interrogatories of Eva Lawrence as on the interrogatories of the said Mary K. Buckner and S. B. Buckner,
714 and upon the cross-bill of the said Mary J. Buckner and Simon B. Buckner in said suit, complainants, against Henry W. Kingsbury, Eva Lawrence, Albert G. Lawrence, and Jane C. Kingsbury, defendants to said cross-bill, in behalf of said complainants in said cross-bill, which were attached to and inclosed with the said commission, and upon none others.

The said WILLIAM F. BARRETT, being first sworn by me as a witness in the said cause previous to the commencement of his examination to testify the truth, as well on behalf of the plaintiffs in the original bill as the defendants thereto, and as well on behalf of the defendants to the cross-bill as of the plaintiffs to the same, in relation to the matters in controversy between the said plaintiffs and

defendants, so far as he should be interrogated, testified and deposed as follows, to wit:

Int. —. What is your name, age, residence, and occupation?

Answer to Int. 1. My name is William F. Barrett; I am fifty years old; I reside in Louisville, Kentucky; I am a lawyer.

Int. 2. Are you acquainted with Mrs. Mary K. Buckner and
715 Simon B. Buckner, parties to this suit; and, if yea, how long have you known them?

Answer to Int. 2. I am acquainted with Mrs. Mary K. Buckner and her husband, Simon B. Buckner. I have known the former some 12 or 15 years and I have known General Buckner for 35 years.

Int. 3. State, if you can, who prepared a deed, dated May 15th, 1861, executed by said Mary K. Buckner and Simon B. Buckner to Henry W. Kingsbury, purporting to convey lots 5 and 6, block 35, original town of Chicago, Illinois, and a tract of land in the city of Chicago known as the "Kingsbury tract," formerly owned by the father of Mrs. Buckner.

Answer to Int. 3. I prepared the deed, dated May 15th, 1861, executed by S. B. Buckner & Mary K. Buckner to Henry W. Kingsbury, purporting to convey lots 5 and 6, block 35, original town of Chicago, Illinois, and a tract of land in the city of Chicago known as the "Kingsbury tract," formerly owned by the father of Mrs. Buckner.

Int. 4. Was you present when it was signed by the parties, respectively? And, if yea, state all the persons present.

Answer to Int. 4. I was present when the deed was signed
716 by the parties, respectively, they and the notary who took the acknowledgment and myself being the only persons present.

Int. 5. Was you present when said deed was acknowledged? And, if yea, state all the persons present. Was the husband of Mrs. Buckner present when it was acknowledged by her? Was she examined separate and apart from her husband? Did the officer who took the acknowledgment explain to Mrs. Buckner the contents and meaning of the deed?

Answer to Int. 5. I was present when the deed was acknowledged. I have in my former answer stated all the persons who were present. S. B. Buckner was present when the deed was acknowledged by Mrs. Buckner. She was not examined separate from her husband. Whether the officer explained the contents and meaning of the deed I have no recollection.

Int. 6. Where was Henry W. Kingsbury, mentioned as grantee, when said deed was signed and acknowledged?

717 Answer to Int. 6. Henry W. Kingsbury was not in Louisville at the time of making or executing the deed. He was, as I am informed, either at West Point or Washington city at the time.

Int. 7. Who requested or directed you to prepare the deed?

Answer to Int. 7. Gen. Buckner requested me to have the deed prepared.

Int. 8. Did you have any conversation with Mrs. Buckner before the deed was prepared or signed by her husband?

Answer to Int. 8. I suppose this question has reference to the object of my making the deed; if so, I answer yes.

Int. 9. Where was her husband when you first had an interveiw with her? Did she sign the deed at that time? Did you advise her to sign it or not to sign it at that time? By whom was the presence of her husband procured when the deed was signed by Mrs. Buckner?

Answer to Int. 9. I was intimate with Gen. Buckner and his wife, and I knew their wishes in relation to the wife's interest in the property inherited by her from her father. She desired him
718 to have a greater interest than he was entitled to by virtue of the marriage. He desired that she should have the entire benefit of the same, and I had had conversation with her repeatedly on this point. Whether her husband was present at the first interview I cannot say. Buckner was absent from Louisville when his wife informed me that she was determined to execute the deed, and I, at her request, telegraphed him to return home, which he did. He was then in Frankfort, Ky. I advised her not to — the deed at that time. She insisted on doing so, and hence I telegraphed Buckner and thus procured his presence.

Int. 10. What, if anything, was the consideration for said deed?

Answer to Int. 10. There was no consideration whatever passed between the parties.

Int. 11. Why was said deed made? And give the source of your information as to the truth of the statements you make.

719 Answer to Int. 11. I presume it was made for the purposes above stated, and I came to that conclusion from the repeated conversations had with Buckner and his wife especially.

Int. 12. Where was Simon B. Buckner on the 20th, 21st, and 22nd day of July, 1861? State your means of knowledge.

Answer to Int. 12. S. B. Buckner was in Kentucky on the 20th, 21st, and 22d of July, 1861. I went with my wife to visit her father, Judge W. C. Goodloe, and Buckner went with us on the train as far as Frankfort, Ky. This was on the evening of the 19th of July, 1861. My wife and I continued on our journey that evening to Lexington, Ky. I returned to Louisville on Tuesday evening following, when I again met Gen. Buckner. From these facts I am certain that he was in Kentucky on the days mentioned.

Int. 13. Was said deed mentioned in third interrogatory executed to enable Gen. Buckner to go into the Confederate army? Was there any purpose or intention by General Buckner, on or before May 15th, 1861, to enter the rebel army? And, if you answer no
720 state your means of knowledge.

Answer to Int. 13. If the deed mentioned in the third interrogatory was made to enable Gen. Buckner to go with the Confederate army I had no knowledge of the fact. If he had any idea at the time of entering the Confederate army I had no knowledge of it. I then believed he was an undoubted Union man. I

judged so from his repeated conversations with me under all circumstances, and our relations were of the most intimate and confidential character. I was a Union man all the time, and I believed at that time his sentiments fully accorded with my own.

Int. 14. State any other fact material in this suit of benefit to the complainants in the cross-bill and within your knowledge.

Ans to Int. 14. I cannot now remember anything except that during the two or three months next after the deed of May, 1861, was executed I know that Gen. Buckner persuaded young men not to enter the Confederate service.

721 Counsel for Mrs. Eva Lawrence, one of the defendants, objected to direct interrogatories numbered 5, 8, 9, 10, 11, 12, and 13, propounded to William F. Barrett, and to each of said interrogatories, as immaterial and incompetent, and propose the following cross-interrogatories to be answered by the said witness.

Cross-int. 1. When and before whom was the said deed referred to in the third direct interrogatory acknowledged by Mrs. Buckner?

Answer to cross-int. 1. The deed was acknowledged on the day of its date, the 15th of May, 1861, before Charles S. Thomasson, who was a notary public.

Cross-int. 2. Where was the said deed acknowledged; and, if you were present, why did you attend the parties on that occasion?

Answer to cross-int. 2. The deed was acknowledged at the office of the Hon. James Speed, who was afterwards the attorney general under Mr. Lincoln, and myself, we being partners in the practice of law, in the city of Louisville. I was present, and went and
722 procured the notary, as I was acquainted with him and Buckner was not.

Cross-int. 3. What was done with the said deed after it was executed and acknowledged?

Answer to cross-interrogatory 3. The deed after acknowledgement was by me or Mrs. Buckner given to a young man who was going to Chicago that evening, Buckner having left to return to Frankfort again before the notary had completed the certificate. This was done at Buckner's request.

Cross-int. 4. Was not General Buckner an avowed opponent of the coercive policy which had been adopted by the national administration towards the States in insurrection on the 15th of May, 1861?

Answer to cross-int. 4. I cannot say that he was, although he might have differed with the administration in its policy. I knew he greatly deplored the condition of the affairs of the country at the time, and seemed to have a greater horror of the effects of a civil war than any one I met, and often expressed a determination not to engage in it.

Cross-int. 5. Was or not General Buckner, on the 15th day of
723 May, openly opposed to any aid being rendered by the State of Kentucky to the national administration in its efforts to suppress the rebellion by force of arms?

Answer to cross-int. 5. I never heard him express an opinion in relation to that subject, that I now recollect, at that time.

Cross-int. 6. Was or not General Buckner, on the 15th of May, 1861, opposed in sentiment to any effort being made to suppress the rebellion by military force?

Answer to cross-int. 6. I cannot say whether he was or not; he never informed me of his views on that subject; I only know that he had a horror of seeing different sections of our country fighting against each other.

Cross-int. 7. To what political party in the State of Kentucky did Gen. Buckner belong on the 15 of May, 1861?

Answer to cross-int. 7. He never took any part in politics, but seemed to support Mr. John Crittenden's views.

Cross-int. 8. Can you state of your own knowledge that Gen. Buckner did not, on the 15th of May, 1861, have some idea that he
724 might engage in the service of the Confederate government?

Answer to cross-int. 8. I cannot state of my own knowledge that Gen. Buckner did not, on the 15th of May, 1861, have some idea that he might engage in the service of the Confederate States; but I can and do say that if at that time Buckner had any such intention I did not know of it, nor do I now believe, from all that I have heard him say, that he had any such design at that time.

Cross-int. 9. Did Gen. Buckner take an active part in the public affairs in the State of Kentucky after the inauguration of President Lincoln on the 4th of March, 1861, down to the time he joined the Confederate army?

Answer to cross-int. 9. So far as I know, he did not. I never knew of his attending a public meeting *at* of a political character during the time. He attended only to the duties of the office of inspector general under the appointment of the Gove-nor of the State, so far as I know.

Cross-int. 10. Were his conduct and course of action as a public man of a uniform and consistent tenor between March 4, 1861,
725 and the time he left Louisville to join the Southern Confederacy? If he changed his opinions or his positions in regard to public questions during the interval, when did the change occur?

Answer to cross-int. 10. Ignoring the fact that he did go South, I saw nothing in his conduct or course of action as a public man which was not uniform and consistent between March 4, 1861, and the time he left. I know nothing of any change of his opinions in regard to public questions during that interval, except from the fact of his then joining the Confederacy.

WM. F. BARRETT.

I, George M. Davie, of the county of Jefferson and State of Kentucky, a commissioner duly appointed to take the deposition of the said William F. Barrett, a witness whose name is subscribed to the foregoing deposition, do hereby certify that previous to the commencement of the examination of the said William F. Barrett as a witness in the said suit between the said Henry W. Kingsbury,
726 complainant in the original bill, and Ambrose E. Burnside, Jane C. Kingsbury, Mary K. Buckner, Simon B. Buckner, John

J. D. Kingsbury, Eva Lawrence, and Albert G. Lawrence, defendants thereto, and Mary K. Buckner and Simon B. Buckner, complainants in the cross-bill, and Eva Lawrence, Henry W. King—, Albert G. Lawrence, and Jane C. Kingsbury, defendants thereto, he was duly sworn by me as such witness to testify the truth in relation to the matter in controversy between the said Henry W. Kingsbury, complainant in the original bill, and Ambrose E. Burnside, Jane C. Kingsbury, Mary J. Buckner, Simon B. Buckner, John J. D. Kingsbury, Eva Lawrence, and Albert G. Lawrence, defendants, and Mary K. Buckner and Simon B. Buckner, complainants, in the cross-bill, and Henry W. Kingsbury, Eva Lawrence, and Albert G. Lawrence and Jane C. Kingsbury, defendants, so far as he should be interrogated concerning the same, and that the said deposition was taken at my office, in the city of Louisville, in the county of Jefferson, State of Kentucky, on the sixteenth day of December, A. D. 1870, and that after the said deposition was taken by me the interrogatories and answers thereto, as written down, were read over to the
727 said witness, and that thereupon the same was signed and sworn to by the said deponent, William F. Barrett, before me, the oath being administered by me as such commissioner at the place and on the day and year last aforesaid.

I further certify that all the interlineations and erasures in the foregoing deposition were made by me at the instance and request of the said William F. Barrett before his signing of the same.

GEO. M. DAVIE,
Commissioner.

The following deposition and exhibits of Mrs. Jane C. Kingsbury, to wit:

STATE OF ILLINOIS, }
County of Cook, } *ss:*

The People of the State of Illinois to James Griswold, Esq., of Old Lynn, in the county of New London, State of Connecticut, or to any judge or justice of the peace of said county of New London:

Whereas it has been represented to us that Mrs. Jane C. Kingsbury is a material witness in a certain cause now pending in our circuit court of Cook county in and for the county of Cook
728 aforesaid, between Henry W. Kingsbury, complainant, and Ambrose E. Burnside and other defendants to the bill of complaint, and Mary K. Buckner and Simon B. Buckner, complainants, and Henry W. Kingsbury and other defendants to the cross-bills, and that the said witness resides at Old Lynn aforesaid, without the said State of Illinois, and that her personal attendance cannot be procured at the trial of said cause:

Now know ye that we, in confidence of your prudence and fidelity, have appointed you commissioner to examine the said witness, and do therefore authorize and require you to cause the said witness to come before you, at such time and place as you may therefor designate and appoint, and diligently to examine the said witness on the

oath or affirmation of the said witness, by you first duly in that behalf administered, and faithfully to take the deposition of the said witness upon all interrogatories inclosed with or attached to these presents, both on the part of the said plaintiffs and of the said defendants, and none others, and the same, when thus taken, together with this commission and the said interrogatories, to certify
729 unto our said circuit court of Cook county with the least possible delay.

Witness Norman T. Gassette, clerk of our said court, — the seal thereof, at Chicago, in said county, this 6th day of December, A. D. 1870.

[L. S.] NORMAN T. GASSETTE, *Clerk.*

STATE OF ILLINOIS, } *ss:*
Cook County, }

In the Circuit Court of Cook County.

HENRY W. KINGSBURY, by His Next Friend, CORYDON BECKWITH, *vs.* AMBROSE E. BURNSIDE, JANE C. KINGSBURY, Mary J. Buckner, Simon B. Buckner, John J. D. Kingsbury, Eva Lawrence, and Albert G. Lawrence.	Bill of Complaint. In Chancery.
MARY K. BUCKNER and SIMON B. BUCKNER *vs.* HENRY W. KINGSBURY, EVA LAWRENCE, ALBERT G. LAWRENCE, and JANE C. KINGSBURY.	Cross-Bill.

730 To the complainant in said original bill of complaint and the defendants to said cross-bill and their solicitors:

Take notice that on the sixth (6th) day of December, A. D. 1870, at ten o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, the undersigned will sue out of the office of the clerk of the circuit court of the county of Cook aforesaid a *dedimus protestatem* or commission, under the seal of said court and directed to James Griswold, Esq., of the — of Old Lynn, in the county of New London and State of Connecticut, or to any judge or justice of the peace of the county and State last above mentioned, to take the deposition of Mrs Jane C. Kingsbury upon the interrogatories hereto attached, to be read in evidence on the part of the complainants in said original bill on the hearing of the above-entitled cause, now pending in the said circuit court on the chancery side thereof, when and where you can appear and file cross-interrogatories and join in said commission if you so wish.

Dated this twenty-fifth day of November, A. D. 1870.

731 GOUDY & CHANDLER,
Solicitors for said Complainants in said Cross-Bill, etc.

We hereby acknowledge service of the foregoing notice and attached interrogatories by a copy thereof this twenty-fifth day of November, A. D. 1870, and consent that the commission may issue at the time above named, longer notice being waived.

C. BECKWITH,
Guardian ad Litem and Next Friend of said Henry W. Kingsbury.
JAMES E. MUNROE,
Of Counsel for Jane C. Kingsbury.
BECKWITH, AYERS & KALES,
Sol'rs for A. G. & Eva Lawrence.

Interrogatories referred to in the foregoing notice and to be answered by Mrs. Jane C. Kingsbury, a witness to be produced, sworn, and examined under and by virtue of the annexed commission, before James Griswold, Esq., or any judge or justice of the peace of the county and State last mentioned in the within notice, in the
732 cause therein mentioned and referred to and now pending in the circuit court of Cook county, Illinois, in chancery, wherein Henry W. Kingsbury is complainant in the original bill of complaint and Ambrose E. Burnside, Jane C. Kingsbury, Mary J. Buckner, Simon B. Buckner, John J. D. Kingsbury, Eva Lawrence, and Albert C. Lawrence are defendants thereto, and wherein Mary K. Buckner and Simon B. Buckner are complainants in the cross-bill and Henry W. Kingsbury, Eva Lawrence, Albert G. Lawrence, and Jane C. Kingsbury are defendants thereto, on the part and behalf of said complainants in said cross-bill and the defendants, Ambrose E. Burnside, Jane C. Kingsbury, Mary J. Buckner, Simon B. Buckner, and John J. D. Kingsbury, to said original bill, as follows, to wit:

Interrogatories to be proposed to Mrs. Jane C. Kingsbury on the part of the defendants, except Albert G. Lawrence and Eva Lawrence, to the original bill and the complainants in the cross-bill.

1. What is your name, age, and residence?
2. Are you one of the defendants in this suit?
733 3. Are you the widow of Major Julius J. B. Kingsbury?
4. When did your late husband, Major Julius J. B. Kingsbury, die? Did he die testate or intestate?
5. Did he leave any children surviving him? And, if so, please give their names. Did he leave any descendants of deceased children?
6. Were these children also your own?
7. Was your daughter, Mary J., married; and, if —, when and to whom?
8. Was your son, Henry W., married; and, if so, when and to whom?
9. Is your son, Henry W., living or dead; and, if dead, when and where did he die? Please state the cause of his death.
10. Did your son, Henry W., have any children born in lawful

wedlock before or after his death? And, if so, please state when, and give the name of the child.

11. Was this his only child?

12. Has your son's widow married again; and, if so, when and to whom? Where does she now reside? Where does your grandson Henry W., reside?

13. Did your son, Henry W., leave a will, or did he die intestate?

734 14. Where and from whom and under what circumstances did you learn that he left a will? State fully.

15. Have you ever seen the original will?

16. Has a copy ever been furnished you; and, if so, when, and who furnished it? Did you request a copy or information before it was given?

17. Did you communicate the knowledge you obtained of the existence or contents of the will to your daughter, Mrs. Buckner, or her husband? And, if you did, please state when.

18. Did you give this information the first opportunity you had after acquiring it yourself?

19. Did your son, Henry W. Kingsbury, make any statement to you in regard to the share of real estate situated in Chicago, Illinois, descended to Mrs. Buckner (your daughter) from her father after the 15th day of May, 1861? And, if he did, please state what he said in regard to it.

20. If he made more than one statement or had more than one conversation in regard to Mrs. Buckner's share, please give them all as fully as possible.

735 21. What was said, if anything, as to a deed made by his sister, Mrs. Buckner, and her husband on or about May 15, 1861, to him conveying Mrs. Buckner's part of the property in Chicago which descended from her father?

22. Did your son, Henry W., ever write any letter to you in which he referred to such subject? And, if so, please attach any such letter or letters or copies thereof to this deposition.

23. If you cannot attach the same or copies because of loss, please give the contents, so far as relates to this subject.

24. Describe as nearly as you can all the property left by your husband.

25. Did your son, Henry W., ever acquire any real estate by purchase; and, if so, what, and where was it situated?

26. Did your son, Henry W., ever hold in his name any property in Chicago for the use and benefit of any person within your knowledge, except by deed of May 15, 1861, executed by Mrs. Buckner and her husband?

27. What was the pecuniary or property circumstances of your son in May, 1861? Was he worth any more than the value of the property inherited from his father?

736 28. Did your daughter have any property at that time other than the estate inherited from her father?

29. When and where was your son, Henry, born?

30. Please state the place where he spent his life.

31. From what congressional district was he appointed a cadet at West Point?

32. Was he graduated at, before, or after the regular time? Was he immediately appointed a lieutenant in the regular army and did he enter active service?

33. Where was your late husband born? What was his profession or occupation?

34. When did he enter the army, how long continue in it, and was he a cadet also at West Point?

35. When did you marry him?

36. Did he have any fixed place of residence after the marriage?

37. Did your son, Henry W., have any fixed place of residence?

38. Please state any other matter or thing within your knowledge touching the matters in controversy in this case.

GOUDY & CHANDLER,
Solicitors for said Complainants in said Cross-Bill, etc.

737 Counsel for Mrs. Eva Lawrence, one of the defendants to the original bill and to the cross-bill in this cause, object to direct interrogatories numbered 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 36, and 37, propounded to Mrs. Jane C. Kingsbury, and to each of them severally, as immaterial and incompetent, and propose the following cross-interrogatories to be answered by the said witness:

Cross-interrogatory 1. Where did your late husband, Julius J. B. Kingsbury, die? Where did he and his family reside at that time, and how long had they resided there?

Cross-int. 2. Please state where the said Julius J. B. Kingsbury resided at the time of your marriage.

Cross-int. 3. Please state where he and his family resided afterwards, giving as nearly as you can the date of his removal to each place and the length of his and their residence at each place.

Cross-int. 4. When did your late husband retire from the army? Where did he reside at that time, and where did he and his
738 family live afterwards, down to the time of his death?

Cross-int. 5. Did your said husband and his family reside at Detroit, in the State of Michigan, after he retired from the United States Army? If yea, how long did they reside there? Did they keep house there? Did he own the house in which he and they resided, or how otherwise?

Cross-int. 6. Where did you reside previous to your marriage, and how long had you resided there?

Cross-int. 7. Where have you resided since the death of your late husband, and for what length of time in each place?

Cross-int. 8. Where was your home at the time your son, the late Henry W. Kingsbury, was appointed a cadet at West Point? How long had you resided there at that time, and where have you since resided?

Cross-int. 9. Did your son, the late Henry W. Kingsbury, live with you at the time he entered the West Point Academy? Where was

his home before that time, and how long had that been his home or usual place of residence?

739 Cross-int. 10. Was your son appointed after his graduation to the command of a regiment of volunteers in the service of the United States? If so, when and where did he receive his said appointment, and from whom? Did he accept said appointment and enter upon the discharge of its duties? If yea, how long did he serve in that capacity?

Cross-int. 11. Was your son at the time of his death acting as colonel of a regiment of Connecticut Volunteers in the United States service? If yea, when did he first become connected with that regiment, and from whom did he receive that appointment?

Cross-int. 12. Have you ever resided in the State of Virginia; if yea, where and when and for what length of time?

Cross-int. 13. Did your late husband or yourself own any property in the State of Virginia at the time of his death; if so, what property and where was it situated?

740 Cross-int. 14. Have you purchased or acquired any property in the State of Virginia since the death of your late husband; if so, what property, and how and when did you acquire it?

Cross-int. 15. Have you resided or had a home or any usual place of residence in the State of Virginia since the death of your late husband; if so, at what place and for what length of time?

Cross-int. 16. Had your son, the late Henry W. Kingsbury, any property in the State of Virginia when he entered the army of the United States; if so, what property and where was it situated?

Cross-int. 17. Did you or not own a residence in the State of Connecticut at the time your son entered the army; if so, how and when did you acquire that property, where was it situated, and did you or not occupy it as your home; if yea, how long did you live there; from what time to what time?

741 Cross-int. 18. If you shall state in answer to any of the direct interrogatories that you had any conversation with your son, the late Henry W. Kingsbury, in relation to Mrs. Buckner's share of the property left by your late husband, please state the time & place of each conversation which you may testify to, and state who was present.

Cross-int. 19. If you shall state in answer to either of the direct interrogatories that your son, the late Henry W. Kingsbury, wrote you any letter or letters in which reference was made to Mrs. Buckner's share or interest in the property left by your late husband, you will please state when and where such letter or letters were written and when and where you received them.

Cross-int. 20. If you shall state that any letter or letters of the nature referred to in the last cross-interrogatory was or were received by you from your son, but that such letter or letters is or are lost, please state when you last saw such letter or letters and where. What did you do with the said letter or letters? Did you ever exhibit them or either of them to any person or persons; if so, when and to whom?

742 Cross-int. 21. If any such letter or letters were ever written and cannot be produced by you, you will please state whether you have or not made a faithful and diligent search for and effort to secure them. Please state what steps you have taken to find or recover them.

Cross-int. 22. If you shall attempt to give the contents of any such letter or letters, you will please state whether or not you are now able to give the language used in said letter or the exact expressions of the writer, or how otherwise.

Cross-int. 23. Were such letters written in reply to any letters written to him by you on the same subject or how otherwise?

Cross-int. 24. When and to whom did you first communicate the fact that you had received any such letter or letters?

Cross-int. 25. When and to whom did you first communicate the contents of any such letter or letters?

B. F. AYER,
Of Counsel for Mrs. Eva Lawrence.

743 The deposition of Mrs. Jane C. Kingsbury, of the town of Old Lynn, in the county of New London and State of Connecticut, a witness named in the foregoing commission, and taken by virtue of and in pursuance of said commission hereto attached.

The said JANE C. KINGSBURY, being first duly sworn by me, James Griswold, the said commissioner, as a witness in the cause named in said commission, previous to the commencement of her examination, to testify the truth, as well on part of the complainants as the defendants, in relation to the matters in controversy between the said complainants and defendants so far as she should be interrogated, testified and deposed as follows:

Answer to interrogatory 1. Jane C. Kingsbury; in my 61st year; residence in Old Lynn, New London county and State of Connecticut.

Answer to Int. 2. I am.

Answer to Int. 3. I am.

Answer to Int. 4. On the 6th day of June, 1856, intestate.

Answer to Int. 5. Two children surviving—Mary Jane and Henry W.; no descendants of deceased children.

744 Answer to Int. 6. They were.

Answer to Int. 7. She was married in May, 1850, to Simon B. Buckner, one of the parties to this suit.

Answer to Int. 8. He was married in December, 1861, on the 4th or 5th, to Eva McL. Taylor.

Answer to Int. 9. He is dead. He died at Antietam from wounds received in battle in September, 1862. He was wounded on the 17th and died on the 18th, as I understood and believe.

Answer to Int. 10. He had one child, born after his death, on December 16th, 1862, named Henry W.

Answer to Int. 11. It was.

Ans. to Int. 12. She has again married, in September, 1865; she married Albert G. Lawrence. She now is at Newport and her son

with her. I do not know that she has any particular place of residence.

Answer to Int. 13. He left a will.

Answer to Int. 14. I first heard from Mr. Cunningham, who was at the funeral, that there were papers left at Fortress Monroe,
745 Virginia. Mr. Cunningham told me that John Taylor told him there were paper- left. Mrs. Kingsbury, my son's wife, then wrote me and sent me a copy of the will, and I have furnished said letter, dated September 28, 1862, and will (hereunto annexed and marked A).

The next was from Mr. Latrobe, of Baltimore, by letter. I had written him asking why the will was not probated. He sent me a copy of the will and a copy of his (Latrobe's) letter to Col. J. H. Taylor, dated October 16, 1862, which I here present as part of this deposition (hereunto annexed and marked B). I also received with these a letter from Mr. Latrobe, which I cannot now find. If I find it I will deliver it to the commissioner, to be attached to my deposition.

Answer to Int. 15. I have never seen the original will. Mrs. Lawrence sent me word she was coming on a visit. I asked her to bring the original will. She, for some cause or other, was detained and did not come at the time. She wrote she would
746 send it by mail, if I wished, as she was not coming. I did not desire her to send it, for fear of its being lost. After a time she visited me, but said nothing of bringing the will. I made no answer to her proposal to send it by mail.

Answer to Int. 16. I have already answered this in my answer to Int. 14.

Answer to Int. 17. I did, to Mrs. Buckner, in the fall of 1866, on her first visit after the war. I gave her a copy of the one I had.

Answer to Int. 18. On the first opportunity of seeing her. It was the first time I had seen her since.

Answer to Int. 19. In August or September, 1861, here in Old Lynn, I had a conversation with my son. I asked him in regard to his sister's property, whether it had been turned over to him (Henry), and told him Simon had told me so. He replied, "That is —, but don't look concerned; it is only turned over to me for safekeeping; it will be restored to her."

I had another conversation with him in December, 1861,
747 when he was here with his bride. He arrived on the 9th and left on the 11th. The conversation was on the 10th. He then made the same remark, that the property would all be restored to her. I then asked him who was to see to it. He replied, "If I am taken away and General Burnside lives he will see to it for you, that Mary's property is restored to her." He says, "I am going to make my will; am going to give you twenty thousand dollars, to do what you please with at your death—I mean mine—out of my property, and not my sister's." He said he hoped the war would *would* soon close and Mary would come home and attend to her own property. This was the last time I saw him. The person referred to as "Simon" was Mr. Buckner.

Answer to Int. 20. I believe I have given them all.

Answer to Int. 21. Nothing, except what I have hereinbefore stated.

Answer to Int. 22. He wrote me a letter dated October 23, 1861,
748 which I here present as a part of the deposition (hereunto annexed and marked C). It is in his own handwriting and the signature "Henry," which was his custom in writing to me, is in his handwriting.

Answer to Int. 23. I do not remember that any are lost.

Answer to Int. 24. He left property at Waterbury, Connecticut, and in Chicago two lots at the corner of Clark and Randolph streets; the Kingsbury tract, on the north branch of Chicago river, above Kinzie street; a tract of about two hundred and forty acres about six miles above Chicago, known as the Caldwell reservation. This was all the real estate. There was no personal property that I know of, except clothing and watch and similar articles.

Answer to Int. 25. Never that I know of.

Answer to Int. 26. He did not.

Answer to Int. 27. Nothing more than the property inherited.

Answer to Int. 28. Not that I know of.

Answer to Int. 29. He was born at Chicago the 25th of December, 1836.

Answer to Int. 30. He was with me until he went away to
749 school, which was about 1846 or '47; then to Tarrytown, New York, at school; then at Sing Sing, New York, then to West Point, and from West Point into the army and into the war.

Answer to Int. 31. From Brooklyn, New York, district, upon the recommendation of Mr. Stranahan, member of Congress from that district.

Answer to Int. 32. He was at West Point five years within one month; he graduated in May in order to be sent to the war. He was immediately appointed a lieutenant in the regular army and entered into active service.

Answer to Int. 33. My husband was born at Waterbury, Connecticut, in 1797. From school he was appointed cadet at West Point. He was an officer in the U. S. Army, appointed from West Point.

Answer to Int. 34. He entered West Point about 1817 or 1818. I believe he entered the army from West Point. He remained in the army till A. D. 1853 or 1854.

Answer to Int. 35. He was married in 1825.

Answer to Int. 36. None except the army.

Answer to Int. 37. None.

750 Answer to Int. 38. Nothing further, except that I have a letter from Henry's widow, dated November 4, 1862, which I here present as a part of my deposition, enclosing a copy of a letter to her from Mr. Latrobe, which I also present as part thereof. (Letter and copy annexed and marked "D.") I had a conversation with her about January, 1863, at Washington. In speaking of the property she said she was sorry Henry's wishes could not be carried out, but that the laws were such they could not be; that she should teach

her son as he grew up that the property did not belong to him and that he should return it to Mrs. Buckner.

Cross-Interrogatories.

Answer to cross-int. 1. He died at Washington, D. C., June 26, 1856. I was here at Old Lynn staying temporarily; we had no fixed place of residence.

Answer to cross-int. 2. He was stationed at St. Mary's, Michigan. It was an army station.

Answer to cross-int. 3. He staid at St. Mary's till 1828; from thence — Hancock's barracks in Maine. I was not with him
751 there. In 1830 he was at Fort Gratiot, in Michigan; in 1831 or '32 he was at Fort Niagara, in New York. From there he went to Chicago; in 1833 back to St. Mary's, Michigan; in 1824 to Michilimackinack. (He was at Pittsburgh before we went to Fort Gratiot.) From Michilimackinack we came to New York, and in 1836 went back to Chicago, from which place he was sent to Michilimackinack, leaving me sick at Chicago. This was in 1837. I think he was twice in Maine. We came from Chicago in 1837 to Brooklyn; from thence to Waterbury, Conn., and from thence to Maine for the second time, and from Maine to the Florida war. This was either in 1837 or 1838. He came home in 1840 on sick leave, I think, and went back when he got well. He subsequently came back with his regiment and went to Sackett's Harbor. We were there till 1845; then back to St. Mary's, Michigan. From there he went to the Mexican war, in 1846, and I came to Connecticut and spent the time during the war at Old Lynn, Waterbury, and Brooklyn, New York.
752 At the close of the Mexican war he returned to New York, and on or about the 14th of December, 1848, sailed from New York to California. He returned from California in 1850, about July. I did not accompany him to California, but remained in New York during his absence. After his return he went to Washington to attend to his affairs, and was traveling back and forth. He then went to Detroit, in 1852, and remained there till 1855; then went to Chicago. He remained there a few months, and then came to New York and Waterbury and Old Lynn; then to Waterbury and then to Washington, I think, in March, 1856. He then was taken ill and died.

Answer to cross-int. 4. He returned from the army about 1854. He had no fixed residence at any time, but was then staying at Detroit—detained there by sickness of the family as long as they remained at Detroit. I have just stated where we lived after that time.

Answer to cross-int. 5. He was temporarily detained there
753 by sickness, as I have stated, for nearly three years. We did not keep house there; we were boarding at a public house—the "Michigan Exchange." We owned no house.

Answer to cross-int. 6. At New York city; about fifteen years.

Answer to cross-int. 7. First at Waterbury, during the summer and fall after his death; from there to Lynn, where I spent the

winter. In the spring of 1857 I went to Nashville, Tennessee, where I stayed with my daughter till the fall of 1857; then came to Brooklyn, New York, at my sister's. In March or April, 1858, went to Kentucky, and then returned to Old Lynn, Conn., during the winter of '58 and '59, where I have remained ever since, except for occasional visits.

Answer to cross-int. 8. I was staying at Old Lynn, Conn. I did not consider it my home.

Answer to cross-int. 9. He was not living with me at that time. He was at school at Sing Sing; had been there three or four years.

Ans. to cross-int. 10. He was not immediately appointed.

754 He took command of the 11th Regiment, Conn. Volunteers, in July, 1862. He received the appointment a short time before from Governor Buckingham, of Connecticut. He served till his death.

Answer to cross-int. 11. He was, as I have just stated.

Answer to cross-int. 12. I have never done so.

Answer to cross-int. 13. None that I know of.

Answer to cross-int. 14. I have not.

Answer to cross-int. 15. I have not, before or since.

Answer to cross-int. 16. None that I know of.

Answer to cross-int. 17. I owned no residence. There was a small place on the property at Waterbury which was occupied by negroes—a shop that had been turned into a house. It was owned by the heirs of my husband. I never lived in it.

Answer to cross-int. 18. I have already fully stated the times and places. There was no one present but myself and my son.

755 Answer to cross-int. 19. The only letter I received from *from* him on that subject was dated at Arlington, Virginia, October 23, 1861. I received it at Old Lynn in due course of mail.

Answer to cross-int. 20. I have not stated that any were lost. None were lost that I know of.

Answer to cross-int 21. There are none such that I know of. I have examined all my papers to see if there was any such, but find none.

Answer to cross-int. 22. I have not attempted to give contents of any such letters. I have presented the letter itself (marked "C").

Answer to cross-int. 23. It was not written in reply to any letter, but in reply to a conversation before had and which I have already stated.

Answer to cross-int. 24. I cannot recollect communicating it to any person before now.

Answer to cross-int. 25. I make the same answer to the last question.

JANE C. KINGSBURY.

756 STATE OF CONNECTICUT, }
County of New London, } *ss:*

I, James Griswold, of the town of Old Lynn, in the county of New London and State of Connecticut, a commissioner duly appointed

to take the deposition of Jane C. Kingsbury, a witness whose name is subscribed to the foregoing deposition, do hereby certify that previous to the commencement of the examination of the said Jane C. Kingsbury as a witness in the suits between the said Henry W. Kingsbury, complainant, and Ambrose E. Burnside and others, defendants, to *to* the bill of complaint, and Mary K. Buckner and Simon B. Buckner, complainants, and Henry W. Kingsbury and other defendants, to the cross-bill, she was duly sworn by me as such commissioner to testify the truth in relation to the matters in controversy between the said complainants and defendants as far as she should be interrogated concerning the same; that the said deposition was taken at the dwelling-house of John Cunningham, in the
757 town of Old Lynn and county of New London and State of Connecticut, on the 20th day of December, A. D. 1870, and that after said deposition was taken by me as aforesaid the interrogatories and answers thereto, as written down, were read over to the said witness, and that thereupon the same was signed and sworn to by the said deponent before me at the place and on the day and year last aforesaid.

JAMES GRISWOLD,
Commissioner.

EXHIBIT A.

WASHINGTON, *Sept. 28th*, 1862.

MY DEAR MOTHER: I know not how to write you, mother. Mother, what shall we do—what will we do—without him? All that I can think is that he is gone, gone, gone. Why was he taken? I can't be resigned. I can't say "Thy will be done." I can only wish for him, long for him, and weep for him. He was so pure, so noble; no one but us know how pure he was. I am coming to you;
758 I want to be with you. I hope to start by the first of next month for Lynn; then I can talk to you and tell you all I want to.

I send you a letter from Mr. Flagler; please return it to me. I will write again soon. Please love me for his sake.

Your daughter, EVA.

I send you a copy of a paper written by Henry and left in my mother's charge just before he started on the Campaign of the Peninsula. I will send you every letter I received telling me of Henry, and indeed, indeed, mother, I will try and be a daughter to you.

EVA.

A.

Expecting soon to start upon a military expedition where death may overtake me, I leave this as a record of my wishes respecting the disposition of my property.

"To my mother, Jane C. Kingsbury, I leave twenty thousand dol

lars, or so much of my Chicago property as upon fair appr-isal may be valued at that amount.

"To my sister, Mary J. Buckner, I leave so much of the
759 Chicago property held in my name as shall amount to one-third of the property in the city of Chicago, Ill., left by my father, Julius J. B. Kingsbury, deceased.

"To my cousin, J. D. Kingsbury, I leave my property in Waterbury, Conn., and, in addition thereto, five thousand dollars, which I trust he will expend in completing his education.

The remainder of my property of every description I leave to my devoted wife, Eva.

I desire, moreover, that the provisions of this will may be so carried out that the yearly income of my wife for her own personal support shall never be less than two thousand dollars ($2,000).

"As executors I name Gen. Ambrose E. Burnside, of Rhode Island, and Capt. John Taylor, com. dep't U. S. army."

Signed at Fortress Monroe, Va., March 25th, 1862.

HENRY W. KINGSBURY,
First Lieutenant 5th Reg't Artillery, U. S. Army.

B.

BALTIMORE, *Oct.* 16*th*, 1862.

To Col. J. H. Taylor.

760 MY DEAR COL.: I have very carefully considered the paper which you left with me, purporting to be the will of the late Colonel Henry W. Kingsbury, and have gone over the statutes and reports of the State of Illinois in this connection.

I am sorry to have to say that the papers are inoperative. In the case of Rigg *vs.* Welton, 13th Illinois Reports, page 15th, it is decided, in conformity with the 109 ch. of the Revised Statutes, that "it is indispensable to the validity of a will that it should be signed by the testator or by some one in his presence or by his direction, and attested in his presence by two witnesses."

Wanting in this last most essential requisite, the will which Colonel Kingsbury has left is of no force in law, and his estate must be regarded as that of an intestate or person dying without a will.

In this state of affairs it becomes interesting to your sister to know what are her rights to her late husband's property and what course she should pursue in regard to it, and as you asked my opinion in these respects I proceed to give it.

761 Going again to the Illinois reports of cases actually decided, I find in Tyson *vs.* Postlewait, 13 Ills., 727, that "when a man dies intestate, leaving a widow, but no descendants (which is your sister's present case), the widow inherits, as heir of the intestate, one-half of the real and all of the personal estate of which her husband died seized (possessed) which shall remain after payment of his debts, and she is also entitled to dower" in the other half—that is to say, your sister would be entitled absolutely to one-half her husband's lands and houses and rents and to one-third of

the other half for her life, while all his stocks, bonds, monies, etc., would belong to her absolutely after his debts, if he left any, were paid.

But if the intestate leaves a child or children, and a child born after his death is to be regarded as though born in his lifetime, then, as decided in the case of Sesk *vs.* Smith, 1 Gilman's Illinois Reports, p. 503, "the widow of the deceased husband is entitled to one-third part of his real estate (land, etc.) for life, and also to one-third
762 part of his personal estate (stocks, etc.) forever which remains after payment of all just debts and claims against his estate." The rest of the intestate's estate would belong to the child or children.

In order to cover the entire ground of one conversation it is proper to add, looking to possibilities that were a child to be born and die before arriving at years, to dispose of and disposing of its property the Revised Code of Illinois, ch. 109, 3–46, provides that where there shall be no children of the intestate nor descendants of such children, and no widow, "then the property goes to the parent's brothers and sisters of the deceased person and to their descendants in equal parts between them."

In other words, were your sister to have a child who died during minority she would take her dower now and the whole estate, as the child's heir, at its death.

I am not sufficiently acquainted with the situation of Col. Kingsbury's property to say how your sister's interest in it, under the laws of Illinois, would differ from that designed for her by Col. K.
763 in the several contingencies here referred to.

But, as far as I understand it, her interest, in any event, will be very large, and in one event even larger than her husband contemplated.

As matters stand, however, she is certainly in no condition to determine upon any course in regard to the wishes expressed by him, and I would advise that she neither say nor do anything to commit herself.

By the laws of Illinois your sister is entitled to administer upon her husband's estate. I would counsel her, if this case be managed, to do so by all means. She will then have the whole buisness in her own hands.

But before she determines upon this even she should have a statement of what his property consists of. Some one must have this if not in Col. K.'s paper, and it should be obtained.

This will falling to the ground, the appointment of executors which it makes also falls. If she pleases, however, she can either
764 renounce her right to administer in favor of the executors named or be united with one or both of them.

Begging you to express to your sister my most sincere and affectionate sympathies and my willingness to do everything that can be done to aid her, I am, dear Colonel,

Faithfully yours, JOHN H. B. LATROBE.

Expecting soon to start upon a military expedition where death

may overtake me, I leave this as a record of my wishes respecting the disposition of my property.

To my mother, Jane C. Kingsbury, I leave twenty thousand dollars, or so much of my Chicago property as upon fair appr-isal may be valued at that amount.

To my sister, Mary J. Buckner, I leave so much of my Chicago property held in my name as shall amount to one-third of the property in the city of Chicago, Ills., left by my father, Julius J. B. Kingsbury, deceased.

To my cousin, John J. D. Kingsbury, I leave my property in Waterbury, Conn., and, in addition thereto, five thousand
765 dollars, which I trust he will expend in completing his education.

The remainder of my property of every description I leave to my devoted wife, Eva. I desire, moreover, that the provisions of this will may be so carried out that the yearly income of my wife for her own personal support shall never be less than two thousand dollars ($2,000).

As executors I name Gen. Ambrose E. Burnside, of Rhode Island, and Capt. John Taylor, commissary department, United States Army.

Signed at Fortress Monroe, Va., March 25, 1862.

HENRY W. KINGSBURY,
First Lieutenant Fifth Regiment Artillery, U. S. Army.

C.

ARLINGTON, VA., *Oct.* 23, 1861.

MY DEAR MOTHER: I spent all the morning with Burnside yesterday. He states, as I told you, that Simon had made over all the Chicago property that was held in his name to me. A new power of attorney is therefore necessary from you and myself. We made one out. I signed it. Burnside will send it to you. I send
766 you a copy for your own keeping and keep one for myself.

Burnside will arrange to pay Mr. Cunningham semi-annually, as you desired. It pinches him a little just now, as it is unexpected. Still he will send two or three hundred dollars now, and hereafter make his arrangements to pay semi-annually. Burnside was much surprised to learn that you had not received all your allowance. He will send it to you soon. It was a piece of negligence on the part of his agent.

Should anything happen to Burnside and myself you will look to his wife in all buisness matters. She is acquainted with his buisness affairs. Her address: Mrs. Mary R. Burnside, Providence, Rhode Island.

Should anything happen to her, too, you will call on Burnside's agent, William W. Bishop, of Providence. He states that he has paid all the interest due for sums borrowed up to this time.

I have a good joke on you. Yesterday I was invited to a din-
767 ner party at Col. Taylor's. I called just before dinner and ex-

cused myself. Mrs. Taylor looked unusually nice. I complimented her on her appearance. "Why," said she, "it is the same old dress I always wear. I have only one that is fit to look at." It reminded me so much of yourself that I could not help smiling. She is a lady that lives in Washington, the very top of society, giving dinner parties every week or two; has one daughter just married, another on the highway to it, her husband chief of the Commissary Department, yet she has but one nice dress and still does not complain of want of clothes. She wears it on all occasions. Mrs. McDonald is the same way. I notice the same black silk on all grand occasions and the same plain morning dress ordinarily. She still comes to Washington to see the General and stay a month at a time. Since your lamentations I have noticed dress more than usual. I find it the same with all ladies. I am beginning to think
768 I should have felt proud of you instead of ashamed if you had come on with me.

The authorities positively refuse to let me take command of the Connecticut regiment, so I relapse into a lieutenant again.

I am delighted that my descriptions pleased Mr. Brainard so so much. I have some maps here that will be of service, I think. I will send them to him. Remember me most kindly to him and his wife.

With much love to aunt and Mrs. C., believe me, dear mother,
Your affectionate HENRY.

Never mind the horse blankets; I'm provided in that way. The cloak will, I fear, prove more of a hindrance than an assistance. I must have a coat for riding.

D.

WASHINGTON, *Nov. 4th*, 1862.

MY DEAR MOTHER: I commenced writing you some days ago; interrupted by my mother being taken suddenly very sick. She is now, I hope, a little better, but still requires my constant at-
769 tention. The handkerchief and Uncle Walter's letter came safely to hand. Please thank him for both.

I hope ere this Aunt Camelia has received the book. The picture you asked me to have painted for you will be finished in a few days. I will send it to you as soon as it is finished.

I wrote you I had sent to General Burnside for the money he owes you. He sends me by my brother-in-law the check for $375.00, which I enclose, saying he would soon send you the rest, and you may be sure I will not let him forget it. He owes you now, you will find by looking at your book, $1,325.00 instead of $1,700.00 (which is the amount due to you for the years 1861 and 1862).

My brother-in-law says in a letter received from him this morning that Burnside promises to send you the — soon—very soon. I will put him in mind of it constantly. Mr. Latrobe has been to see me. He will put everything straight right away. He has written

to Burnside for a statement of everything. I send you a copy of a letter I wrote to Burnside. Mr. Latrobe used to be in the
770 army. He was at West Point with your husband, and they were great friends.

He says that the will cannot be made valid, but he tells me, at the same time, that I can give Mary everything she is entitled to. I am very anxious to have everything fixed before next month, so much depends upon my child. If it lives it will inherit everything, but I will be its guardian and can act for it until it becomes of age. If it lives but for one moment, if it just breathes or shows signs of life and then dies, I, as its heir, inherit everything from it.

I wish you could hear Mr. Latrobe talk; he makes everything so plain. I have put everything in his hands, giving him for his guide Henry's will. I have tried to do, mother, as I think my husband would wish me to, and, from what you said to me when in Brooklyn, I think I am doing as you would if you were here. If there is anything that you want me to do, or anything that I have done that you do not approve of, do not hesitate to tell me.
771 I send you also a copy of the letter I wrote to Mr. Latrobe.

Do not forget that you are to come to me early in December. Ma says if she were well enough she would write to you herself to tell you how welcome you will be, but, as she is not, you must take the assurance through me. She does want to know you so much. She loved my husband as if he had been her own son. Henry, when we talked of your coming to us, would say so often, "Oh, Eva, I know our mothers will love each other."

I will write to you again very soon. All send best love to you. Give my very best — to Aunt Camelia and Uncle Walter. Sister Belle and ma were delighted with those furs.

The toy house was found the next morning and is put safely away until Christmas. Ma thinks the doll the prettiest doll the world ever saw.

Now good-bye. Write to me soon.

Your affectionate daughter, EVA.

Please excuse the looks of my letter, but I am constantly interrupted.

E. K.

772 *Copy of Letter to Mr. Latrobe.*

WASHINGTON, *Oct.* 29, 1862.

MY DEAR MR. LATROBE: I am about to take advantage of your kind offer to attend to my business affairs and to ask you to become my legal adviser and show me the proper way of carrying out my husband's plans and wishes. You know, of course, that I am perfectly ignorant of all the forms necessary.

I would like to see you at your earliest convenience, for I can talk more plainly than I can write, and am very anxious to have everything settled at once.

My sister and her little boy unite with me in love to Mrs. Latrobe and all at Fairy Knowe.

Sincer-ly yours, EVA KINGSBURY.

The following deposition and exhibits of Ambrose E. Burnside, to wit:

STATE OF ILLINOIS, } ss:
County of Cook, }

The People of the State of Illinois to J. F. Roberts, Esq., or D. McLean Shaw, Esq., of the city of New York, in the county of
773 New York, State of New York, or to any judge or justice of the county of New York:

Whereas it has been represented to us that Ambrose E. Burnside is a material witness in a certain cause now pending in our circuit court of Cook county, in and for the county of Cook aforesaid, between Henry W. Kingsbury, complainant, and Ambrose E. Burnside and other defendants to the bill of complaint, and Mary K. Buckner and Simon B. Buckner, complainants, and Henry W. Kingsbury and other defendants to the cross-bill, and that the said witness resides at New York aforesaid, without the said State of Illinois, and that his personal attendance cannot be procured at the trial of said cause:

Now, know ye that we, in confidence of your prudence and fidelity, have appointed you commissioner to examine the said witness, and do therefore authorize and require you to cause the said witness to come before you, at such time and place as you may therefor designate and appoint, and diligently to examine the said witness
774 on the oath or affirmation of the said witness, by you first duly in that behalf administered, and faithfully to take the deposition of the said witness upon all interrogatories inclosed with or attached to these presents, both on the part of the said plaintiffs and of the said defendants, and none others, and the same, when thus taken, together with this commission and the said interrogatories, to certify unto our said circuit court of Cook county with the least possible delay.

Witness Norman T. Gassette, clerk of our said court, and seal thereof, at Chicago, in said county, this 6th day of December, A. D. 1870.

[L. S.] NORMAN T. GASSETTE, *Clerk.*

STATE OF ILLINOIS, } ss:
Cook County, }

In the Circuit Court of Cook County.

HENRY W. KINGSBURY, by His Next Friend, CORYDON BECKWITH,
vs.
AMBROSE E. BURNSIDE, JANE C. KINGSBURY, MARY J. BUCKNER, SIMON B. BUCKNER, JOHN J. D. KINGSBURY, EVA LAWRENCE, and ALBERT G. LAWRENCE. } Bill of Complaint. In Chancery.

MARY K. BUCKNER and SIMON B. BUCKNER
vs.
HENRY W. KINGSBURY, EVA LAWRENCE, Albert G. Lawrence, and Jane C. Kingsbury. } Cross Bill.

To the complainants in the said original bill of complaint and the defendants to the said cross-bill and their solicitors:

Take notice that on the sixth (6th) day of December, A. D. 1870, at ten o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, the undersigned will sue out of the office of the clerk of the circuit court of the county of Cook aforesaid a *dedimus protestatem* or commission, under the seal of said court and directed to J. F. Roberts or D. McLean Shaw, Esq., of the city of New York, in the county of New York, and State of New York, or to any judge or justice of the peace of the county and State last above mentioned, to take the deposition of Ambrose E. Burnside
776 upon the interrogatories hereto attached, to be read in evidence on the part of the complainants in said cross-bill and defendants to said original bill on the hearing of the above-entitled cause, now pending in the said circuit court on the chancery side thereof, when and where you can appear and file cross-interrogatories and join in said commission if you so wish.

Dated this twenty-fifth day of November, A. D. 1870.

GOUDY & CHANDLER,
Solicitors for said Complainants in said Cross-Bill, etc., etc.

We hereby acknowledge service of the foregoing notice and attached interrogatories by a copy thereof this twenty-fifth day of November, A. D. 1870, and consent the commission may issue at the time named above, longer notice being hereby waived.

BECKWITH, AYER & KALES,
Solicitors for Albert G. and Eva Lawrence.

JAMES E. MONROE,
Of Counsel for Jane C. Kingsbury.

C. BECKWITH,
Guardian ad Litem, Next Friend for Henry W. Kingsbury.

777 Interrogatories referred to in the foregoing notice and to be answered by Ambrose E. Burnside, a witness to be produced, sworn, and examined under and by virtue of the annexed commission, before J. F. Roberts, Esq., or D. McLean Shaw, Esq., or any judge or justice of the peace of the said county and State last mentioned in the within notice, in the cause therein mentioned and referred to, and now pending in the circuit court of Cook county, Illinois, in chancery, wherein Henry W. Kingsbury is complainant in the original bill of complaint and Ambrose E. Burnside, Jane C. Kingsbury, Mary J. Buckner, Simon B. Buckner, John J. D. Kingsbury, Eva Lawrence, and Albert G. Lawrence are defendants thereto, and wherein Mary K. Buckner and Simon B. Buckner are complainants in the cross-bill and Henry W. Kingsbury, Eva Lawrence, Albert G. Lawrence, and Jane C. Kingsbury are defendants thereto, on the part and behalf of said complainants in said cross-bill and the defendants, Ambrose E. Burnside, Jane C. Kingsbury, Mary J.
778 Buckner, Simon B. Buckner, and John J. D. Kingsbury, to said original bill, as follows, to wit:

Interrogatories to be proposed to Ambrose E. Burnside on the part of the defendants (except Albert G. Lawrence and Eva Lawrence) to the original bill and the complainants to the cross-bill.

1. What is your name, age, and residence?

2. Are you one of the defendants in this case?

3. Are you acquainted with the parties in this suit; and, if yea, how long have you known them, respectively?

4. Were you acquainted with Henry W. Kingsbury, son of Major Julius J. B. Kingsbury, in his lifetime; and, if yea, how long did you know him?

5. Did you ever have the management of the estate of Major Julius J. B. Kingsbury, situated in Chicago, Illinois? And, if so, state when such management commenced, when it ended, and by what arrangement you entered on the same, stating also the time when and with whom such arrangement was made.

6. What disposition was made of the proceeds or rents and
779 profits of the property while it was under your control?

7. Was there any change of such application of the rents and profits after the 15th day of May, 1861, from the course of business before that date?

8. Did Henry W. Kingsbury at any time in his lifetime, within your knowledge, receive all the rents and profits or the net proceeds of the same?

9. Do you know of any claim or acts of ownership by said Henry W. Kingsbury over said property after the 15th day of May, 1861, indicating that he was the sole owner of said property in Chicago, subject only to the right of dower of his mother and the incumbrances? And, if yea, state fully all you know about such claim or acts.

10. When and where did Henry W. Kingsbury die? State the

cause and circumstances of his death. What was his rank in the army at that time?

11. Was you an officer in the army at that time; and, if yea, what? Please give the command held by you at the battle of Antietam. Was Henry W. Kingsbury under your command?

780 12. Did you have any conversation with Henry W. Kingsbury after he was wounded, in regard to his property or business? And, if so, state fully such conversation.

13. Are you one of the persons named as executor of the will of said Henry W. Kingsbury?

14. State fully when you first learned of the existence of contents of said will, when you first obtained possession of the same, and the reasons why it was not sooner presented for probate.

15. Was any opposition made to a delivery of the will to you as an executor; and, if so, who made the objection? And state all you know in regard thereto.

16. What declarations or statements did Henry W. Kingsbury make, if any, in regard to Mrs. Buckner's share of the property descended from his father and located in Chicago after May 15, 1861?

17. Who succeeded you in the management of the Kingsbury estate in Chicago, and when?

18. Did Henry Kingsbury, within your knowledge, ever hold in his own name any property in Chicago for the use or benefit of any person, except by the deed of May 15, 1861, executed by Mrs. Buckner and her husband; and, if so, what was it?

781 19. Did you ever have the possession of said deed from Mrs. Buckner or her husband to Henry W. Kingsbury, dated May 15, 1861?

20. Did Henry W. Kingsbury ever have possession of such deed, so far as you know?

21. What was the value of Mrs. Buckner's share of the Kingsbury estate May 15, 1861?

22. Did Henry W. Kingsbury ever acquire any real estate by purchase, within your knowledge; and, if so, what was it?

23. How long did you reside in Chicago? Please give the time when you entered the army.

24. If you had the management of the Kingsbury estate for the heirs after you left Chicago, state the manner in which you did so and the name of your agent.

25. Were you acquainted with the handwriting of Henry W. Kingsbury, deceased?

26. Have you seen the original will — the said Henry W. Kingsbury; and, if so, did you make or cause to be made a copy thereof? And, if you did, look at the paper hereto attached, marked

782 "Exhibit A," and state whether or not the same is a true copy of the original.

27. In whose handwriting is the original of which "Exhibit A" is a copy? Is the signature thereto the genuine handwriting and signature of the said Mary [Henry] W. Kingsbury?

28. Where is the original bill?

29. What estate did said Henry W. Kingsbury have, if any, at Alexandria, Virginia, when said will was admitted to probate?

30. Please state any other matter or thing material to the controversy in this suit.

GOUDY & CHANDLER,
Solicitors for said Complainants in said Cross-Bill, etc.

783 EXHIBIT A.

Expecting soon to start upon a military expedition where death may overtake me, I leave this as a record of my wishes respecting the disposition of my property:

"To my mother, Jane C. Kingsbury, I leave twenty thousand dollars, or so much of my Chicago property as upon fair appraisal may be valued at that amount.

"To my sister, Mary J. Buckner, I leave so much of the Chicago property held in my name as shall amount to one-third of the property in the city of Chicago, Ill., left by my father, Julius J. B. Kingsbury, deceased.

"To my cousin, John J. D. Kingsbury, I leave my property in Waterbury, Connecticut, and, in addition thereto, five thousand dollars, which I trust he will expend in completing his education.

"The remainder of my property of every description I leave to my devoted wife, Eva. I desire, moreover, that the provisions of this will may be so carried out that the yearly income of my wife for her own personal support shall never be less than two thousand dollars ($2,000).

"As executors I name Gen. Ambrose E. Burnside, of Rhode Island, and Capt. John Taylor, Com. Dep't, U. S. Army."

Signed at Fortress Monroe, Va., March 25th, 1862.

HENRY W. KINGSBURY,
First Lieutenant 5th Reg't Artillery, U. S. Army.

784 Counsel for Mrs. Eva Lawrence object to direct interrogatories numbered 5, 6, 7, 8, 9, 12, 13, 14, 15, 16, 17, 18, 21, and 22, propounded to Gen. Ambrose E. Burnside, and to each of them severally, as immaterial and incompetent, and propose the following cross-interrogatories to be answered by the said witness:

Cross-int. 1. When and where did you enter the military service of the United States, in which you were engaged during the late civil war?

Cross-int. 2. Were you or not appointed colonel of a Rhode Island regiment which was mustered into the service of the United States in 1861, soon after the outbreak of the late rebellion; if yea, when did you receive such appointment and when did you enter upon the discharge of its duties?

Cross-int. 3. Did you have anything to do personally either with the collection or the disbursement of the rents and profits of the Kingsbury estate in Chicago after the 15th of May, 1861?

Cross-int. 4. Have you any personal knowledge respecting the dis-

positions made of the rents and profits of the said estate after May 15th, 1861?

Cross-int. 5. Was not all your time occupied after May 15th, 1861, down to the death of the late Henry W. Kingsbury by your military duties?

Cross-int. 6. Did the said Henry W. Kingsbury have command of a regiment of troops in the United States service at the time of his death; if yea, what regiment, and when and by whom was he appointed to such command?

785 Cross-int. 7. At whose suggestion or by whose request did you present the paper purporting to be in the nature of a last will and testament of Henry W. Kingsbury for probate in the State of Virginia?

Cross-int. 8. Did you have anything to do with the presentation of said paper for probate in the State of Virginia; if yea, what and at whose request?

Cross-int. 9. Was any effort made by the friends of the late Henry W. Kingsbury after his death, so far as you know, to secrete the said paper or conceal the fact of its having been executed?

Cross-int. 10. Was not the fact of the existence of such a paper communicated to or known by you soon after the said Henry W. Kingsbury's death; if yea, how soon, and who had possession of the said paper, and what was done with it?

B. F. AYER,
Of Counsel for Eva Lawrence.

Cross-int. 11. If you shall state that the said Henry W. Kingsbury had any estate or effects in the State of Virginia when the said illegal will was admitted to probate, you will please describe the same fully. Please state how you know that the said effects belonged to the said Henry W. Kingsbury. When did you see the said effects? And state, if you know, how they happened to be in Alexandria. Did the said Henry W. Kingsbury leave them there; if so, when? Were they at Alexandria at the time of his death, or otherwise? Do you know who brought the said effects to Alexandria; if yea, who was it?

Cross-int. 12. Have you any reason to believe, and do you believe, that the said effects were brought to Alexandria after the said Henry W. Kingsbury's death? If yea, state the reasons for such belief, and who it was you suppose took them there.

786 & 787

B. F. AYER,
Of Counsel for Eva Lawrence.

The deposition of Ambrose E. Burnside, of the county of New York and State of New York, a witness of lawful age produced, sworn, and examined upon his corporal oath, on the twenty-seventh day of December, in the year of our Lord one thousand eight hundred and seventy, at the office, No. 26 Exchange Place, in the city of New York, in the county of New York and State aforesaid, by me, J. F. Roberts, a commissioner duly appointed by a *dedimus potestatum* or commission, issued out of the clerk's office of the circuit court of Cook county, in the State of Illinois, bearing teste in the name of Norman T. Gassette, clerk of said circuit court, with the seal of said court affixed thereto, and to me directed as such commissioner for the examination of the said Ambrose E. Burnside, a witness in a certain suit and matter in controversy, now pending and undetermined in the said circuit court, described in the annexed commission, upon the interrogatories which were attached to or inclosed with the commission and upon none others.

The said AMBROSE E. BURNSIDE, being first duly sworn by me as a witness in the said causes, previous to the commencement of his examination, to testify the truth as well on the part of the plaintiffs as the defendants in relation to the matters in controversy between the said plaintiffs and defendants so far as he should be interrogated, testified and deposed as follows:

Answer to interrogatory 1. My name is Ambrose E. Burnside; I am 46 years of age, and reside at Providence, Rhode Island. I have an office and transact business at 26 Exchange Place, in this city.

Answer to Int. 2. I am one of the defendants in this suit.

Answer to Int. 3. I am acquainted with all the parties to this
788 suit, except the child, Henry W. Kingsbury. I have known Simon B. Buckner since the year 1843 and Mrs. Buckner since about the year 1850, and Mrs. Kingsbury since the year 1858, and John D. Kingsbury since the fall of 1869. Mrs. Lawrence I have known since about 1851, and her husband, Albert G. Lawrence, since about 1865.

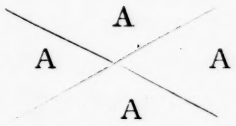
Answer to Int. 4. I was acquainted with Henry W. Kingsbury, deceased. I think I knew him about six years—from 1856 to the time of his death.

Answer to Int. 5. Yes; the management commenced in 1858 and extended to December, 1862. The first arrangement was made in 1858 with Simon B. Buckner, who was then sole agent of the estate. Afterwards I received a power of attorney from Simon B. Buckner and his wife and Mrs. Jane C. Kingsbury & Henry W. Kingsbury. The power of attorney I have just spoken of was given about December, 1859.

Answer to Int. 6. The income of the estate was applied by me in the payment of interest, taxes, repairs, &c., and the payment of the different parties in interest. These last were Mrs. Jane C. Kingsbury, Simon B. Buckner and wife, and Henry W. Kingsbury.

Answer to Int. 7. There was not, except that I do not remember to have paid anything to General or Mrs. Buckner after that date.

J. F. R.



Answer to Int. 8. No; he did not, as far as I know.

Answer to Int. 9. I know of nothing unless it is the will in question.

Answer to Int. 9. Henry W. Kingsbury was mortally wounded at the battle of Antietam, on the 17th day of September, 1862, and died on the 18th of September, 1862. He was colonel of the Eleventh Connecticut Volunteers and first lieutenant of the
789 Fifth United States artillery, regular service.

Answer to Int. 11. I was major general of volunteers at that time and commanded the left wing of the Army of the Potomac at the battle of Antietam, and Henry W. Kingsbury was under my command.

Answer to Int. 12. I did. When the information came to me that he was wounded I went to see him. He told me that he feared that he was mortally wounded, and requested that he should not be moved from the place he was in. He also requested me to look after the interests of his wife, mother, and sister. I asked if he had any instructions to give me. He said, in substance, that he had already left the necessary directions as to his affairs, as I would see in future.

Answer to Int. 13. I am.

Answer to Int. 14. I first learned of the existence of the will from Mrs. Buckner in 1866 or 1867. It was in the fall of 1866. I now remember she gave me a copy of the will, which had been sent to her mother. I first saw the original will on the 12th day of June, 1869, in the possession of R. G. Hazard, Esq., at No. 110 Broadway, New York city. I first obtained possession of the original will about the 1st May, 1870, and the reason it was not sooner presented for probate was because it was not in my possession, and I presented it as soon as I obtained possession of it. As soon as I learned the whereabouts of the will I endeavored to get possession of it.

Answer to Int. 15. There was made opposition by attorneys representing Henry W. Kingsbury or Mr. Beckwith, his attorney, but the surrogate decided to give me the will.

Answer to Int. 16. I remember that we had conversations, and I think it was in October, 1861, in reference to the property, but I cannot remember the substance of conversations.

Answer to Int. 17. John H. B. Latrobe, in December, 1862.
790 Answer to Int. 18. No.

Answer to Int. 19. No.

Answer to Int. 20. No.

Answer to Int. 21. $400,000 or $500,000.

Answer to Int. 22. None that I know of.

Answer to Int. 23. I resided in Chicago eighteen months. I think I left in *in* the fall of 1859. I re-entered the army in April, 1861.

Answer to Int. 24. I had the management of the estate after I left Chicago up to the time I turned it over to Mr. Latrobe. The details of the work in Chicago was all done by W. D. Mitchell.

Answer to Int. 25. I was and am.

Answer to Int. 26. I have. I had a copy made, and the annexed paper marked "Exhibit A" is a true copy of the original will. I also had a photographic copy of the will made, which I desire to present as "Exhibit B" and annexed to this my deposition.

Answer to Int. 27. Both body of the will and signature are in the handwriting of Henry W. Kingsbury.

Answer to Int. 28. On file in corporation court of the city of Alexandria, Virginia, where it was proved.

791 Answer to Int. 29. I was informed by my attorney that there was personal property belonging to the estate, and there were moneys to which the estate had a claim.

Answer to Int. 30. I remember nothing else just now.

Cross-Interrogatories.

Answer to cross-int. 1. In April, 1861, in the State of Rhode Island.

Answer to cross-int. 2. I was. I received the appointment and entered upon the discharge of duty in April, 1861.

Answer to cross-int. 3. I had.

Answer to cross-int. 4. I have.

Answer to cross-int. 5. It was not. I gave directions as to my private affairs, and also with reference to the affairs of this estate.

Answer to cross-int. 6. Yes; he commanded the 11th Connecticut. He was appointed by the Governor of Connecticut, as all volunteer officers of regulars were appointed, and afterwards was mustered into the United States service.

792 Answer to cross-int. 7. My action in the matter was taken by request of Mrs. Jane C. Kingsbury, Mrs. S. B. Buckner, and John J. D. Kingsbury.

Answer to cross-int. 8. I directed my attorney to have the same proved in consequence of the request of parties just named and with a view of carrying out the wishes of the late Col. Kingsbury and because I desired to see justice done to all parties concerned.

Answer to cross-int. 9. Not to my knowledge, although it was not brought to my notice by parties having possession of the will.

Answer to cross-int. 10. It was not brought to my notice until some time after his death. The first copy of the will that I ever saw was handed me by Mrs. Buckner, in the presence of her mother, in the fall of 1866. The first knowledge I had of the where-

abouts of the original will was in 1869, when I learned that it was in the possession of Mr. R. G. Hazard, of New York city, who told me that he claimed to hold it for Mrs. Lawrence, and he said he would only give it up on her order.

793 —. I was informed by my attorney that there was property and effects there belonging to the estate of Henry W. Kingsbury. He showed me papers representing them. They were not left there by Henry W. Kingsbury. There was a deposit of money at Alexandria, Virginia, in addition to effects spoken of, which belonged to General S. B. Buckner, which my attorney attached in a suit against said Buckner for a claim due said estate. There was also a deposit there made by me, as executor, to cover all the expenses of legal proceedings, but these deposits still remain there. I do not know how the other effects came there.

Answer to cross-int. 12. I believe they were brought there after Henry W. Kingsbury's death. I have already stated that I do not know who took them there, except the deposits, as already stated. I cannot state exact reasons for my belief.

A. E. BURNSIDE.

794 I, John F. Roberts, of the city, county, and State of New York, a commissioner duly appointed to take the deposition of the said Ambrose E. Burnside, a witness whose name is subscribed to the foregoing deposition, do hereby certify that previous to the commencement of the examination of the said Ambrose E. Burnside as a witness in the suits mentioned in the said commission he was duly sworn by me as such commissioner to testify the truth in relation to the matters in controversy between the said parties as far as he should be interrogated concerning the same.

That the said deposition was taken at No. 26 Exchange Place, in the city of New York, in the county of New York and State of New York, on the 22nd day of December, A. D. 1870, and that after said deposit- was taken by me the interrogatories and answers thereto as written down were read over to the said witness, and that thereupon the same was signed and sworn to by the said deponent, Ambrose E. Burnside, before me as such commissioner at the place and on the day and year last aforesaid.

795 JOHN F. ROBERTS,
Commissioner.

EXHIBIT B. J. F. Roberts, Commissioner.

Expecting soon to start upon a military expedition where death may overtake me, I leave this as a record of my wishes respecting the disposition of my property.

To my mother, Jane C. Kingsbury, I leave twenty thousand dollars, or so much of my Chicago property as upon fair appr-isal may be valued at that amount.

To my sister, Mary J. Buckner, I leave so much of the Chicago property held in my name as shall amount to one-third of the prop-

erty in the city of Chicago, Ills., left by my father, Julius J. B. Kingsbury, deceased.

To my cousin, John J. D. Kingsbury, I leave my property in Waterbury, Conn., and, in addition thereto, five thousand dollars, which I trust he will expend in — his education.

The remainder of my property of every description I leave to my devoted wife, Eva. I desire, moreover, that the provisions of
796 this will may be so carried out that the yearly income of my wife for her own personal support shall never be less than two thousand dollars ($2,000).

As executors I name Gen. Ambrose E. Burnside, of Rhode Island, and Capt. John Taylor, commissary department, United States Army.

Signed at Fortress Monroe, Va., March 25, 1862.

HENRY W. KINGSBURY,
First Lieutenant Fifth Regiment Artillery, U. S. Army.

The following deposition- of D. W. Mitchell and John G. Shortall, to wit:

Be it remembered that on application of Mary K. Buckner and Simon B. Buckner, the complainants in the cross-bill in a suit now pending in the circuit court of Cook county, State of Illinois, wherein Henry W. Kingsbury, by his next friend, Corydon Beckwith, is complainant in the original bill and Ambrose E. Burnside, Jane C. Kingsbury, Mary J. Buckner, Simon B. Buckner, *et al.* are defendants to the original bill, and Henry W. Kingsbury, Eva Lawrence, Albert G. Lawrence, and Jane C. Kingsbury are defendants to the cross-bill, I, S. W. Burnham, official reporter of the courts of Chicago,
797 and authorized to take and certify depositions to any of the courts in the State of Illinois, by virtue of an act of the General Assembly of the State of Illinois approved March 11th, 1869, entitled "An act to amend an act entitled An act for the appointment of official reporters and for the preservation of evidence in *evidence in* certain cases in Cook county," have, this thirteenth day of December, A. D. 1870, at the office of Ely, Burnham & Bartlett, 93 Washington street, in the city of Chicago and State aforesaid, pursuant to agreement of counsel of all above-named parties, proceeded to examine David W. Mitchell and John G. Shortall as witnesses in behalf of the complainants in the cross-bill and defendants in the original bill, except Albert G. Lawrence and Eva Lawrence in the aforesaid suit, W. C. Goudy, Esq., appearing before me on the part of the complainants in cross-bill and defendants to original bill, except Albert G. Lawrence, Eva Lawrence, and Corydon Beckwith, Esq., on behalf of the said Henry W. Kingsbury, and Beckwith, Ayer & Kales on behalf of Albert G. Lawrence and Eva Lawrence; and I
798 do further certify that this [these] deposition- was [were] taken by agreement between the parties on behalf of Mary K. Buckner, Simon B. Buckner, Ambrose E. Burnside, Jane C. Kingsbury, and John J. D. Kingsbury, who appear by Goudy & Chandler, their solicitors. Corydon Beckwith, guardian *ad litem* for Henry

W. Kingsbury, appears for him, and Beckwith, Ayer & Kales, solicitors, appear for Albert G. Lawrence and Eva Lawrence.

And I further certify that the said DAVID W. MITCHELL, being by me fully examined, cautioned, and fully sworn to testify the whole truth, was examined by Mr. GOUDY, and testified as follows:

Q. 1. What is your name, age, and residence?

A. D. W. Mitchell; age, 39, and residence, Chicago.

Q. 2. How long have you resided in Chicago?

A. Fifteen years last March.

Q. 3. What has been your occupation since you have been in this city?

A. I have, generally speaking, been what is termed a real-estate agent.

Q. 4. Did you have any connection with the property which formerly belonged to Major Julius J. B. Kingsbury? If so, what?

A. I had charge of it from November 20, 1860, up to some
799 time during November, 1868, collecting the rents and managing it generally.

Q. 5. What is the property — belonged to that estate?

A. It was lot- 5 and 6, in block 35, of the original town of Chicago, Illinois, and a portion on the North Branch of the Chicago —, part of section 19, called the Kingsbury tract.

Q. 6. Can you give any accurate description of the Kingsbury tract?

A. It is bounded on the north by a line 3 feet north of the center of Ontario street, on the east by Butler, Wright & Webster's Addition, on the south by Kinsie street, and on the west by the North Branch of the Chicago river. The north line was originally ninety feet further north, but the part north of Ontario street was not under my management.

Q. 7. You stated that it was in section 9—in what township and range?

A. 39 N. and 14 E. of the third principal meridian.

Q. 8. What part of the section?

A. All of the east half of the northwest quarter of section 9 east of the North Branch of the Chicago river, south of Sedgwick's
800 Addition, said addition being about 90 feet north of Ontario street.

Q. 9. Was the property known as the Kingsbury tract embraced in the description contained in a deed, bearing date May 30, 1833, executed by James Kingsbury and wife to Julius J. B. Kingsbury and recorded May 31, 1833, in Book A, p. 139, in Cook county, Illinois?

A. It was.

Q. 10. For whom did you act when you had management of the property of the Kingsbury estate and collecting rents therefor?

A. Well, I was employed by General Buckner and Henry Kingsbury. They were both present when the engagement was made.

Q. 11. They made the arrangement with you, but did you act for any person but those?

A. I acted for old Mrs. Kingsbury, as I understand it.

Q. 12. And Mrs. Buckner?

A. And Mrs. Buckner.

Q. 13. What was the arrangement made between Henry Buckner and James Kingsbury with you?

A. It was that I should go on and collect the rents and lease the property and pay the taxes, and so forth.

801 Q. 14. When was the arrangement made?

A. That was — in August, 1860, a day or two before the commencement of the engagement.

Q. 15. Where did General Buckner reside then?

A. I think he was living in Louisville, Kentucky, then.

Q. 16. Where did Henry W. Kingsbury reside?

A. In West Point Academy. General Buckner may have been living in Nashville at the time. He had been living in Nashville. I am not positive which town he was at. My impression is that he was living in Louisville.

Q. 17. How long did you continue to act under that arrangement?

A. Well, I acted up to May, 1861, I believe.

Q. 18. Was there any change made in 1861, or any new arrangement?

A. Nothing further than to report all my collections and accounts to General Burnside.

Q. 19. To whom did you report your collections before that time?

A. I don't think I made any report at all. When General Buckner was up here he would look over these matters, or when General Burnside was out he looked over them.

802 Q. 20. Had General Burnside himself control of your actions in regard to the property since 1861?

A. He had; yes, sir. He had control, and I looked upon him or anything he might say as authority.

Q. 21. Did you first find him in the management when you first commenced your duties?

A. He had more or less the management of it.

Q. 22. Did you receive directions from General Burnside?

A. Sometime.

Q. 23. Did you receive them from General Buckner?

A. Yes, sir; sometimes.

Q. 24. What directions, if any, were given you in May, 1861, by any person? And state who it was, if any were given.

A. General Buckner gave me instructions to report all further collections and buisness to General Burnside; that he didn't wish to be consulted in the matter any further.

Q. 25. How long did you continue to report to General Burnside?

A. Up unto the time that Mr. Latrobe took charge of the affairs, which was some time about the first of January, 1863, I believe.

Q. 26. Did you act under Mr. Latrobe?

A. Yes, sir.

Q. 27. For how long?

803 A. From 1863 to 1868, from the time I commenced; it was somewhere in the neighborhood of the first of January, 1863, or the latter part of December, 1862.

Q. 28. Please state what your *your* exact position was in the management of this property when General Burnside and General Buckner and Mr. Latrobe were over you, and their positions.

A. I had what you may term exclusive control, but my actions were to supervise. Anything that was of any moment—that I considered of any magnitude—before I took a step I would report to them. In small matters, as a lease for a short time, or any small matter, I took action on my own account, but everything else I reported to them. As a general thing, anything I considered of any magnitude before I took action I referred to them; but my action was universally confirmed whenever I did refer to them.

Q. 29. Did you mean to say that General Burnside was the chief agent and you the sub-agent under him?

A. Yes, sir.

Q. 30. Was that the same relation you occupied to Mr. Latrobe?

804 A. Yes, sir. I don't know exactly what Mr. Latrobe's position was. He was agent and attorney, I believe. I don't think he was anything else. He had full authority to control the estate, as I understand it.

Q. 31. Did you remit money to Mr. Latrobe?

A. Yes, sir.

Q. 32. For how long a time?

A. For the whole term for which he was acting as agent.

Q. 33. After you took charge of the property, in 1860, did you make any report or remit any money prior to May, 1861?

A. I made no report. Whether I remitted any money or not I don't know. I don't think I did. The Kingsbury block had just been built, and there were a good many bills back unpaid, and the first rentals from that or the first moneys that were received were used in paying off those bills. General Burnside made a special mission out here from New York to settle up the bills remaining unpaid in the Kingsbury block. It was some time in 1861—the first part of 1861—early in the spring, is my recollection.

By Mr. AYER:

Q. —. What is the Kingsbury block?

A. A museum, as it is called.

805 Q. 35. On Randolph street?

A. Yes, sir.

By Mr. GOUDY:

Q. 36. What was the amount of rents the property was producing the first year that you had it?

A. I think it was between 12 and 13 thousand dollars.

Q. 37. What was the amount of rents it produced the last year you had charge of it?

A. It was something over 48,000 dollars.

Q. 38. What was the value of the real estate belonging to the heirs of Julius J. B. Kingsbury on the 15th of May, 1861, situated in Chicago, Illinois?

(Objected to as immaterial.)

A. I suppose the property would be worth as much as six hundred thousand dollars.

Q. 30. Would that be a cash value or an asked value of the property?

A. I judge that would have been a cash value. There wasn't much selling then, but I presume that it would have sold for that much, the whole property.

Q. 40. At how much more was it estimated at in the way property was generally rated?

(Objected to.)

A. Well, property was generally rated twenty or twenty-
806 five per cent.—sometimes thirty per cent.—more than what was considered a cash value.

Q. 41. Do you recollect the amount of incumbrance on the property at that time?

A. No, sir.

Q. 42. Can you state the approximate amount?

A. About 137,500.

Q. 43. What is the present value of the same property?

(Objected to.)

A. I think it would be worth a million and a half dollars.

Q. 44. Did you ever have in your possession a deed executed by Gen. Buckner and his wife to Henry W. Kingsbury, dated May 15th, 1861, conveying an undivided half of this property?

A. Yes, sir.

Q. 45. From whom did you receive it?

A. It was brought to me by a young man named Thomas Mitchell.

Q. 46. From whom did he bring it?

A. He brought it from Gen. Buckner.

Q. 47. Did you receive any directions in regard to its disposition?

A. There was a letter enclosed that instructed me to place it on record.

Q. 48. Where is that letter?

A. The letter is destroyed.

Q. 49. Do you know that it is destroyed?

807 A. Yes, sir; I done it with my own hands.

Q. 50. What did that letter state?

A. It stated that enclosed was a deed to place on record, and to report all further proceedings to Gen. Burnside; that he didn't wish to be consulted in the matter any further in regard to the management of the Chicago property. That was the exact words of the letters.

Q. 51. At what time did you receive this deed and the letter?

A. I think I received it on the 17th day of the month, on [or] the second day afterwards.

Q. 52. What month?

A. May.

Q. 53. 1861?

A. Yes, sir.

Q. 54. What did you do with the deed?

A. I filed it for record in the recorder's office of Cook county, Illinois.

Q. 55. Did you ever see that deed since the time you say you filed it?

A. No, sir.

Q. 56. Did you ever take or authorize it to be taken from the recorder's office?

A. No; I never took it and I never authorized anybody else to take it from the recorder's office.

Q. 57. Do you know where the deed is now?

808 A. No, sir; I have no knowledge whatever of it.

Q. 58. What property was owned by Henry W. Kingsbury when you took the management of it, in 1860?

A. He owned the undivided half of the Kingsbury tract and an undivided half of these two lots, five and six, in block thirty-five.

Q. 59. The same property you have described?

A. Yes, sir.

Q. 60. What property did Mrs. Buckner own at that time?

A. She was supposed to own the other undivided half of the same property.

Q. 61. What interest at that time did Mrs. Jane C. Kingsbury have in this property?

A. She, being the widow of Gen. Julius J. B. Kingsbury, had a dower-right interest during her lifetime in the whole property.

Q. 62. Did either Henry W. Kingsbury or Mrs. Buckner have any other property during the time you had charge of the estate or property?

A. None that I am aware of.

Q. 63. Do you know whether or not Henry W. Kingsbury, during his lifetime, had any other property in Chicago, Cook county, Illinois?

A. I never heard of his having any other.

809 Q. 64. Were you his sole agent to represent his entire interest as to property in Chicago?

A. So far as I know.

Q. 65. Did you receive any directions from General Burnside or any other person to transfer your reports to Mr. Latrobe?

A. I had a letter from General Burnside with a letter of introduction of Mr. Latrobe to me, and my impression is that there was instructions in that, or rather directions in it, that he would take charge of the property after that time.

Q. 66. Where was General Burnside residing when you took charge of the property, in August, 1860?

A. I think he was residing in New York at that time.

Q. 67. Do you know when he went to New York?

A. No, sir; I do not. Near that time; not long before that.

Cross-examination by Mr. AYER:

Q. 1. Who is the gentleman who had charge of the property before you were employed as such in 1860?

A. Well, I don't know much about the property. I don't think there was anybody except General Burnside and General
810 Buckner; both acted in conjunction, one as much as the — one.

Q. 2. Did General Burnside reside at Chicago at that time?

A. He had up to a short time before that time. I don't think he was residing in Chicago at the time I took charge of it. He had a short time before that.

Q. 3. Where was General Buckner residing at the time he transmitted the deed to you of which you have spoken?

A. He was residing in Louisville then; at least, the letter and deed was from there then. He was residing there then.

Q —. When did you destroy the letter?

A. About five or six week- ago—maybe two months, not very long ago; in running over my old papers I found it and tore it up.

Q. 5. Was it before or after the commencement of this suit?

A. I believe it was after the commencement of this suit, some time.

Q. 6. Why did you destroy it?

A. Just because I had no further use for it. I was rum-aging my desk and destroying all the old letters I didn't wish to keep, and found this and destroyed it.

Q. 7. Have you stated all you remember of the contents of this letter?

811 A. Yes, sir; I think I stated everything, word for word.

Q. 8. Do you remember whether any letter-press copy of that letter had been taken before it was sent to you?

A. I don't know whether there had been or not.

Q. 9. How long before you received that deed was it before you saw General Buckner?

A. I hadn't seen him since 4th of March preceeding.

Q. 10. When did you see him next afterwards?

A. About last January some time, seven or eight years afterwards.

Q. 11. To whom did you report for instructions after you had filed the deed for record, as you have stated?

A. I didn't make any report. I merely sent the surplus money that I might have. Sometimes General Burnside might draw on me for some money, but I made no detailed report of it during his whole administration—only of the money I sent him, the surplus money I might have on hand.

Q. 12. Did you see General Burnside in Chicago after May 17th, 1861, while you remained agent of this property?

A. Well, I saw him once during the war. He was out
812 here during the spring or summer — 1861. Whether it was before the 17th day of May or afterwards that he came out to settle up these outstanding claims against the Kingsbury block, I

don't know. My impression — that it was early in the spring; it might have been after that time.

Q. 13. When was the last time that you transmitted to him any funds?

A. I could not tell precisely; not a great while before Mr. Latrobe took the general management of affairs.

Q. 14. Who is Latrobe?

A. An agent from Boston.

Q. 15. State whether or not he is a practicing lawyer in Baltimore.

A. I understand him to be such.

Q. 16. Was he or not employed by a widow of Henry W. Kingsbury to take charge of this property?

A. She informed me so.

Q. 17. How many times did you ever see Henry W. Kingsbury?

A. Never saw him but once in my life.

Q. 18. Where was that *that?*

A. In Chicago.

Q. 19. Did you inform anybody of the receipt of that deed, and of its being recorded?

A. I may have told persons of it, but I don't know anything about it now.

Q. 20. Did General Burnside know of the fact?

813 A. I presume he did; he might from my consulting him.

Q. 21. In what business was General Burnside engaged after May, 1861, while he retained any connection with this property?

A. It was either treasurer or assistant treasurer of the Illinois Central railroad, residing in New York city. Whether he occupied the position of treasurer or assistant I could say; at any rate, he was in the treasurer's office.

Q. 22. How soon did he become connected with the army?

A. I think he went out in the army at the first breaking out of the war.

Q. 23. Was he or not in the army at the time you received this deed and left it for record?

A. I really don't know, sir.

Q. 24. Where was Henry W. Kingsbury at that time?

A. I don't know whether he was at West Point Academy or went into the army.

Q. 25. Did you ever have any correspondence with Henry W. Kingsbury?

A. I wrote him once, consulting about something or other, and I had an answer. This is the only time I ever had any correspondence with him.

Q. 26. When was that?

A. During 1861, I think.

814 Q. 27. Was it before or after that deed was left for record?

A. That I don't know.

Q. 28. Where was he when you wrote him?

A. He was in Washington city then.

Q. 29. Was he then in the army?

A. I think he was. He signed himself colonel of some regiment, I believe. No; he signed himself first lieutenant of the fourth artillery.

Q. 30. Did you have any correspondence with Mr. Buckner after the 17th of May, 1861?

A. No.

Q. 31. Or with his wife?

A. No.

Q. 32. Where was General Buckner and his family during the war?

A. Supposed to be in the Southern army; at various and sundry points, so far as I know. I never knew of my own knowledge where he was. He was at Fort Warren awhile.

Q. 33. Do you know whether his wife accompanied him?

A. I don't think she did, though I am not positive. She did during her residence in the South, but not all the time.

Q. 34. Was she at Louisville at any time during the war?

A. I don't know; I know nothing about her movements there.

815 Q. 35. Who attended to paying the interest upon the incumbrances upon this property?

A. During the management of General Burnside he attended to paying the interest; afterwards Mr. Latrobe paid the interest on the monies loaned. I paid all the taxes and ordinary bills and kept the premises in repair, etc.

Q. 36. Do you know whether Henry W. Kingsbury was associated in any way with General Burnside in 1861?

A. No.

Q. 37. Do you know whether Henry W. Kingsbury was at any time during 1861 and 1862 upon General Burnside's staff, in the army?

A. I have heard so; I know nothing of it of my own knowledge at all.

Q. 38. Did Mr. Latrobe come out to Chicago when he assumed the management and control of this property?

A. Yes.

Q. 39. How long did he retain such management?

A. I think he retained it as long as I did; I think we both went overboard at the same time.

Q. 40. Who succeeded him?

A. I believe J. Mason Parker.

Q. 41. Who employed J. Mason Parker?

A. That I don't know.

816 Q. 42. How long did Parker retain control of this property?

A. I don't know.

Q. 43. Do you know who succeeded him?

A. D. J. Lake.

Q. 44. By what authority was Lake put in the control of this property?

A. I understand by authority of county court.

Q. 45. Was he not appointed guardian by the county court of the person of Henry W. Kingsbury?

A. Whether or not he was appointed guardian I don't know; he was appointed either guardian, agent, or something of the sort by county court.

Q. 46. By whom were you selected — 1860 as agent of the property?

A. I suppose by General Buckner and Henry Kingsbury; they were both together.

Q. 47. Had you been acquainted with either of them before that time?

A. I had been acquainted with General Buckner.

Q. 48. How long?

A. About five years.

Q. 49. Where did you become acquainted with him?

A. Here in Chicago.

Q. 50. You never knew him down in Kentucky?

A. No, sir; he was in the army then.

Redirect examination by Mr. GOUDY:

817 Q. 1. You have stated that you understand that Mr. Latrobe was employed by the widow of Henry W. Kingsbury. Didn't you also understand that he was employed by Mrs. Jane C. Kingsbury?

A. Yes; I think I have seen the power of attorney from her and young Mrs. Kingsbury, both to him; I am not positive about it.

Q. 2. When you passed from the control of General Buckner to Mr. Latrobe was there any change made in your duties or the compensation?

A. There was a change made in the compensation.

Q. 3. What change?

A. I had been working for a stated salary before, and afterwards I got a percentage. It may not have been immediately at the change. I don't think it was. It was during Mr. Latrobe's administration.

Q. 4. What salary did you get?

A. I got a thousand dollars a year.

Q. 5. Who fixed that?

A. General Burnside fixed that.

Q. 6. When was that amount determined upon?

A. I think it was in July or August, 1861.

818 Q. 7. Did you have any interview with General Burnside in regard to the management of this business while he was in the army?

A. Yes.

Q. 8. At some other place in Chicago?

A. Yes; twice.

Q. 9. Where?

A. I went once to New York city and once to Fortress Monroe.

Q. 10. At what time?

A. I went to New York city in July or August, 1861, and I went to Fortress Monroe in July, 1862.

Q. 11. Did you go of your own motion or at his request?

A. At his request.

Q. 12. Do you know whether or not Henry W. Kingsbury was at Fortress Monroe when you were there in July, 1862?

A. I didn't see. I am not positive whether he was there; his command was there.

By Mr. AYER:

Q. 13. What was his command?

By the WITNESS: It was a Connecticut regiment. He was under Burnside there at the timee he was killed. Burnside had command of his regiment, or something of the sort, or he was on his staff.

By Mr. GOUDY:

Q. 14. He was in General Burnside's division?

A. Burnside's corps.

819 Q. 15. You stated that you destroyed the letter received in May, 1861, with the deed some two months ago.

A. Yes.

Q. 16. Did you read the letter at that time?

A. Yes.

Q. 17. Did any persons suggest the destruction of that letter?

A. No.

Q. 18. Did you communicate the facts of its destruction to any person afterwards; if so, when and to whom?

A. I have not communicated it to anybody unless I did to you. I believe you asked me about it once. I don't know whether I communicated it to you or not, but to nobody else.

Q. 19. Was there any design of any sort in destroying that letter to suppress it as evidence?

A. None in the world. I read it over and first thought it useless and destroyed it along with a great many others.

DAVID W. MITCHELL.

And I do further certify that JOHN G. SHORTALL, having been sworn, was examined in chief by Mr. GOUDY, and testified as follows:

Q. 1. What is your name, age, and residence?

A. John G. Shortall; thirty-two; Chicago.

Q. 2. What is your buisness or occupation?

A. Examining titles to real estate in this county.

Q. 3. What is the style of your firm?

A. Shortall & Howard.

820 Q. 4. Have you indexes and facilities in your office for ascertaining the records of all the deeds in this county?

A. Yes.

Q. 5. Have you been requested to make an examination for the

purpose of ascertaining whether or not any deed to Henry W. Kingsbury of property in this county has ever been made of record?

A. Yes.

Q. 6. Have you made such examination?

A. It has been made by the office.

Q. 7. When?

A. Within a week.

Q. 8. What deed or deeds, if any, did you find made to Henry W. Kingsbury?

A. We found one only, a deed from Simon B. Buckner and wife, and recorded in Book 212, page 624.

Q. 9. There is no other deed, within your knowledge, of record in this county to Henry W. Kingsbury?

A. None within my knowledge.

Q. 10. Your books show none others?

A. We made the examination from various sources of information, the principal one being the only one that can be used for that purpose—*i. e.*, the Grantee Index to Deeds, etc., in and belonging to the recorder's office of this county.

JOHN G. SHORTALL.

821 And I do further certify that the preceeding deposition-, taken on application of parties as aforesaid in a suit now pending in the circuit court of Cook county, State of Illinois, particularly described in the caption to these depositions, was [were] reduced to writing by me and signed by the said David W. Mitchell and John G. Shortall in my presence, and that I am not of counsel or attorney for either of the parties to said suit, nor am I interested in the event thereof.

Witness my hand and seal this thirteenth day of December, A. D. 1870.

[SEAL.] S. W. BURNHAM,
Official Report- of the Courts of Chicago.

My fee, $10, paid by Goudy & Chandler.

S. W. BURNHAM.

The following deposition of John Woodbridge, to wit:

Circuit Court of Cook County.

HENRY W. KINGSBURY, by His Next Friend, CORYDON BECKWITH,
vs.
AMBROSE E. BURNSIDE and Others. } Original Bill.

MARY K. BUCKNER and SIMON B. BUCKNER
vs.
HENRY W. KINGSBURY and Others. } Cross-Bill.

Depositions Taken by Agreement.

Present: Corydon Beckwith, for Henry W. Kingsbury, his next

friend and guardian *ad litem;* Beckwith, Ayer & Kales, for Albert G. Lawrence and Eva Lawrence; Goudy & Chandler, for Simon
822 B. Buckner, Mary K. Buckner, Ambrose E. Burnside, Jane C. Kingsbury, and John J. D. Kingsbury.

JOHN WOODBRIDGE, being duly sworn and examined in chief by GOUDY and CHANDLER on behalf of the parties represented by them, in answer to the following interrogatories testified as follows:

Q. What is your name, age, residence, and occupation?

A. My name is John Woodbridge; my age is 41; my occupation, attorney-at-law; residence, Chicago.

Q. Do you hold any official position by appointment of the circuit court of Cook county; if so, what?

A. I am receiver of the estate of Henry W. Kingsbury by an appointment of that court in the cause of Jane C. Kingsbury against Eva Lawrence and others and the two cross-bills that are on file in the same cause.

Q. What property is in your charge as receiver? You need not give a particular description, but a general one.

A. Two original lots in the old town of Chicago, northeast corner of Randolph and Clark streets, fronting one hundred and
823 sixty feet on Randolph and running back to the alley; also a tract of land on the North Branch of the Chicago river, extending from Kinzie street north to the centre of Ontario street, fronting west on the Chicago river and east in a line parallel to Market street and about two hundred and fifteen feet west of Market street.

Q. Ordinarily called the "Kingsbury tract?"

A. Ordinarily called the "Kingsbury tract."

Q. How long have you been such receiver?

A. I was appointed in April, 1869. I think I entered upon my duties about the 23d of that month. I received the first money on account of the estate on the 23d day of April, 1869.

Q. Are there any buildings on this property belonging to the estate; and, if so, what?

A. There is the building known as the Kingsbury block, on Randolph street, being numbers 111, 113, 115, and 117 Randolph. The building on the corner does not belong to the estate. There is also a building on the North Side known as number 25 Kinzie street. There are several frame buildings on the tract on the North Side.

824 Q. What is the present annual amount of rents in the aggregate received from this property?

A. I think the leases call for about eighty-five thousand dollars a year. From that sum must be deducted something for bad debts. The precise amount I cannot now state.

Q. State, as nearly as you can in round numbers, the amount of current expenses for taxes, etc., per year.

A. I think the ordinary taxes would not be far from 16 thousand dollars a year; repairs, say 4 thousand; insurance, about 4 thousand; interest, about 12 thousand; expenses of managing property, includ-

ing my commission, in the neighborhood of five thousand. There have been ever since I managed the estate, in addition, large amounts in special assessments for improving streets, etc.

Q. What disposition have you made of those rents and profits which you have been receiving?

A. I have first paid the expenses of running the estate, the cost of improving streets, the cost of repairs, etc., and I have divided
825 the income, three-ninths or one-third to Mrs. Jane C. Kingsbury, two-ninths to Mrs. Eva Lawrence, the balance to Henry W. Kingsbury. I should say, in addition, paid some debts on account of those persons to various individuals, which came out of their respective shares. Perhaps I ought to explain that the sum 85 thousand dollars included the store No. 113 Randolph street, which has been vacant now for several months, and that rental should be deducted.

Q. Making deductions for unoccupied property and bad debts, what would be the amount?

A. I should say 80 thousand dollars could be relied on, although I may be in error about it. Last year we did not lose a thousand dollars, I think, but this year we are going to lose more, or I fear so.

Cross-examination by BECKWITH, AYER & KALES:

Q. In the suit in which you are receiver is Henry W. Kingsbury, one of the parties in this cause, a party also in that suit?

A. Yes, sir; I so understand.

Q. You have paid Henry W. Kingsbury or account- with
826 him since your receivership for four-ninths of the income of the Kingsbury property, have you not?

A. I have up to the date of the annual settlement in May last, and am directed by the order of appointment to account to him for that amount in future.

Q. And you are still under such orders from the circuit court, are you not?

A. Yes, sir.

JOHN WOODBRIDGE.

Subscribed and sworn to before me this 28th day of December, 1870.

NEWTON LULL,
Notary Public.

The foregoing deposition was taken, by agreement of parties in the case entitled in the caption, before me, at the office of John Woodbridge, in Chicago, on the 28th day of December, 1870, the parties being represented as is stated in the caption, to be read in evidence on the hearing of said cause on the part of the complainant- in said cross-bill and the defendant- to said original bill, except Eva Lawrence and Albert G. Lawrence; and I further certify that the fore-
827 going deposition was reduced to writing by me and signed by the said John Woodbridge in my presence and was duly sworn to by him before me, and that prior to his examination

the said John Woodbridge was by me duly sworn to testify the truth and the whole truth in regard to the matters about which he should be interrogated.

Witness my hand and notarial seal this twenty-eighth day of December, 1870.

[SEAL.] NEWTON LULL,
Notary Public.

Notary's fees, $4.50, paid by Goudy & Chandler.

And the court, on objections being made to the competency of the evidence in each of the foregoing depositions contained, thereupon received them in evidence herein, subject to all legal objections going to the sufficiency, competency, and relevancy thereof under the pleadings in the said original and cross cause, no objections being made, however, to copies of papers produced and read in place of the original thereof.

JOHN G. ROGERS,
One of the Judges of the Cook County Circuit Court, Illinois.

828 I, Norman T. Gassette, clerk of the circuit court of Cook county, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect, and complete copy of all papers on file and all proceedings entered of record in a certain cause lately pending in said court on the chancery side thereof, wherein Henry W. Kingsbury is complainant and Ambrose E. Burnside *et al.* are defendants to the bill and Mary K. Buckner and Simon B. Buckner complainants and H. W. Kingsbury *et al.* defendants to the cross-bill.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Chicago, this 3d day of January, A. D. 1871.

[SEAL.] NORMAN T. GASSETT, *Clerk.*

Stamp, 5 cents (1.114), Jan. 3d, '71.
$100 for the record, paid by Goudy & Chandler.

STATE OF ILLINOIS:

Central Grand Division, Supreme Court. January Term, 1871.

MARY K. BUCKNER and SIMON B. BUCKNER *vs.* HENRY W. KINGSBURY, EVA LAWRENCE, Albert G. Lawrence, and Jane C. Kingsbury.	Appeal from the Circuit Court of Cook County.

829

And now comes the said Mary K. Buckner and Simon B. Buckner, appellants, and say that manifest error hath intervened in the proceedings, of which the foregoing is a record, to their injury, and they assign the following errors, to wit:

1. The circuit court of Cook county erred in dismissing the cross-bill. The circuit court erred in dismissing the original bill without prejudice.

2. The circuit court of Cook county erred in refusing the relief prayed in the cross-bill; and,

3. The proceedings are otherwise informal and erron-ous.

Wherefore they pray the judgment of this court in the premises, and that the decree below, so far as it dismissed said cross-bill, be reversed and remanded, with specific instructions to the court below to enter a decree granting the relief asked in said cross-bill, or that a final decree be rendered in this court, etc.

GOUDY & CHANDLER,
Attorneys for Appellants.

R. W. WOOLEY, *Of Counsel.*

830 And then comes Henry W. Kingsbury, — his next friend, C. Beckwith, and assigns for error—

1st. The dismissal of the original bill.

2d. Refusing the relief prayed by the original bill.

3d. Admission of incompetent evidence in the original suit.

Wherefore we pray that the decree in original suit may be reversed and cause remanded.

C. BECKWITH, *Of Counsel.*

STATE OF ILLINOIS, }
Supreme Court, Central Grand Division, } *ss:*

I, William A. Turney, clerk of said supreme court, hereby certify the foregoing to be a complete copy of the transcript of a record filed in said supreme court on the 4th day of January, A. D. 1871, at the January term, A. D. 1871, of said supreme court, in the cases wherein Henry W. Kingsbury, by his next friend, Corydon Beckwith, was appellant and Ambrose E. Burnside *et als.* were appellees, and Mary J. Buckner and Simon B. Buckner were appellants and Henry W. Kingsbury *et als.* were appellees, as the same now ap-

831 pears from the said transcript now on file in my office.

In testimony whereof I have hereunto set my hand and affix- the seal of said court, at Springfield, the 31st day of October, A. D. 1871.

[OFFICIAL SEAL.] WM. A. TURNEY,
Clerk of Supreme Court.

STATE OF ILLINOIS, }
Cook County, } *ss:*

I, Norman T. Gassette, clerk of the circuit court of Cook county, in the State of Illinois, hereby certify the above and foregoing to be a true and complete copy of the record of a certain cause pending in said court, wherein Henry W. Kingsbury was complainant and Ambrose E. Burnside *et al.* were defendants to the bill and Mary K. Buckner and Simon B. Buckner complainants and H. W. Kingsbury *et al.* defendants to the cross-bill.

Witness my hand and the seal of said court this 17th day of June, A. D. 1872.

[OFFICIAL SEAL.] NORMAN T. GASSETTE, *Clerk.*

Endorsed: Filed May 18, 1878. W. H. Bradley, clerk.

832 KINGSBURY *vs.* BUCKNER.—EXHIBIT "B."

At a supreme court begun and held at Ottawa, on Tuesday, the tenth day of September, in the year of our Lord one thousand eight hundred and seventy-two, within and for the northern grand division of the State of Illinois.

Present: Charles B. Lawrence, chief justice; Sidney Breese, justice; Pinkney H. Walker, justice; W. K. McAllister, justice; Benjamin R. Sheldon, justice; Anthony Thornton, justice; John M. Scott, justice.

HENRY W. KINGSBURY
vs.
MARY BUCKNER. } No. 352. Appeal from Cook.

Be it remembered that on the eighth day of October, in the year of our Lord one thousand eight hundred and seventy-two, came Henry W. Kingsbury, by Henry Crawford and E. S. Isham, his attorneys, and filed in said supreme court a certain additional transcript of the record and proceedings of the circuit court of the county of Cook in the words and figures following, to wit:

833 UNITED STATES OF AMERICA.

STATE OF ILLINOIS, } *ss:*
Cook County, }

Pleas before the honorable the judges of the circuit court of Cook county, at a term thereof begun and held at Chicago, in said county and State, on the third Monday (being the sixteenth day) of September, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States the ninety-seventh.

Present: Honorable Erastus S. Williams, chief justice of the circuit court of Cook county, State of Illinois; W. W. Farwell, Henry Booth, John G. Rogers, Lambert Tree, judges; Charles H. Reed, State's attorney; Timothy M. Bradley, sheriff.

Attest: NORMAN T. GASSETTE, *Clerk.*

* * * * * * *

834 State of Illinois Supreme Court, Central Grand Division, *ss:*

At a supreme court begun and held at Springfield on Tuesday, the 3d day of January, in the year of our Lord one thousand eight hundred and seventy-two, to wit, on the 7th day of February, in the year of our Lord one thousand eight hundred and seventy-one.

Present: Charles B. Lawrence, chief justice; Pinkney H. Walker, justice; Sidney Breese, justice; William K. McAllister, justice; John M. Scott, justice; Anthony Thornton, justice; Benjamin R. Sheldon, justice.

HENRY W. KINGSBURY, by His Next Friend, CORYDON BECKWITH, *vs.* AMBROSE E. BURNSIDE, MARY I. BUCKNER, Simon B. Buckner, Jane C. Kingsbury, Eva Lawrence, and Albert G. Lawrence.	162.	Appeal from Cook.

On this day came again the said parties, and the court, having diligently examined and inspected as well the record and proceedings aforesaid as the matters and things therein assigned for
835 error, and being now sufficiently advised of and concerning the premises, are of opinion that in the record and proceedings aforesaid and in the rendition of the decree aforesaid there is manifest error; therefore it is considered by the court that for that error and others in the record and proceedings aforesaid the decree of the circuit court in this behalf rendered be reversed, annulled, set aside, and wholly for nothing esteemed, and that this cause be remanded to the circuit court for such other and further proceedings as to law and justice shall appertain; and it is further considered by the court that the said appellant recover of and from said appellees costs by him in this behalf expended, and that he have execution therefor.

I, William A. Turney, clerk of the said supreme court, do hereby certify that the foregoing is a true copy of the final order of the said supreme court in the above-entitled cause of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of the said
[OFFICIAL SEAL.] 836 supreme court, at Springfield, this 20th day of October, in the year of our Lord one thousand eight hundred and seventy-one.

WM. A. TURNEY,
Clerk Supreme Court.

Filed Oct. 23, 1871.

NORMAN T. GASSETTE, *Clk.*

State of Illinois Supreme Court, Central Grand Division, *ss:*

At a supreme court begun and held at Springfield on Tuesday, the 3d day of January, in the year of our Lord one thousand eight hundred and seventy-one, to wit, on the 7th day of February, in the year of our Lord one thousand eight hundred and seventy-one.

Present: Charles B. Lawrence, chief justice; Pinkney A. Walker, justice; Sidney Breese, justice; William K. McAllister, justice; John M. Scott, justice; Anthony Thornton, justice; Benjamin R. Sheldon, justice.

837 MARY J. BUCKNER and SIMON B. BUCKNER
vs.
HENRY W. KINGSBURY, EVA LAWRENCE, ALBERT G. LAWRENCE, and JANE C. KINGSBURY. } 163. Appeal from Cook.

On this day came again the said parties, and the court, having diligently examined and inspected as well the record and proceedings aforesaid as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, are of opinion that in the record and proceedings aforesaid and in the rendition of the decree aforesaid there is manifest error; therefore it is considered by the court that for that error and others in the record and proceedings aforesaid the decree of the circuit court in this behalf rendered be reversed, annulled, set aside, and wholly for nothing esteemed, and that this cause be remanded to the circuit court for such other and further proceedings as to law and justice shall appertain; and it is further considered by the court
838 that the said appellants recover of and from the said appellees costs of [by] them in this behalf expended, and that they have execution therefor.

I, William A. Turney, clerk of the said supreme court, do hereby certify that the foregoing is a true copy of the final order of the said supreme court in the above-entitled cause of record in my office.

In testimony whereof I have hereunto set my
[OFFICIAL SEAL.] hand and affixed the seal of the said supreme court, at Springfield, this 20th day of October, in the year of our Lord one thousand eight hundred and seventy-one.

WM. A. TURNEY,
Clerk Supreme Court.

Filed October 23, 1871.

NORMAN T. GASSETTE, *Cl'k.*

* * * * * * *

839 Nov. 4, 1871.

Circuit Court of Cook County. In Chancery.

HENRY W. KINGSBURY, by His Next Friend, CORYDON BECKWITH,
vs.
AMBROSE E. BURNSIDE *et al.* } Bill.

MARY K. BUCKNER *et al.*
vs.
HENRY W. KINGSBURY *et al.* } Cross-Bill.

This cause coming on upon the motion of Mary J. Buckner and Simon B. Buckner, part of the defendants to the original bill and the complainants in the cross-bill, Ambrose E. Burnside, Jane C. Kingsbury, and John J. D. Kingsbury, there of the defendants to the original bill, for leave to file a copy of the transcript of the

record of the pleadings, evidences, orders, and decree in this cause, certified by William A. Turney, clerk of the supreme court of Illinois for the central grand division, on the 31st day of October,
840 1871, as a true transcript, made and certified by the clerk of this court to said supreme court in the prosecution of the appeals from the decree rendered herein on the 24th day of December, 1870, as a substitute for the original papers and record which have been lost and destroyed by fire, and it appearing to the court that due notice of said motion has been given by the parties making said motion to all the other parties herein, according to the rules and practice of this court, and no objection being made to the allowance of such motion, and it appearing to the satisfaction of the court, from the proof now produced in open court as well as from the judicial knowledge of the court, that all the original pleadings, evidence, and record of proceedings in this cause were lost and destroyed by fire on the 9th day of October, 1871, without the fault or neglect of the parties, and that said copy of the transcript so certified by the clerk of the supreme court and now presented is a true, perfect, and complete copy of the pleadings, evidence, and orders and decree so lost and destroyed—

841 It is therefore by the court now here ordered that said certified copy of such transcript be filed by the clerk, and that same be hereafter held and considered as a substitute for the original pleadings, evidence, orders, and decree with the like force and effect as the originals which have been so lost and destroyed, and that the cost of making said certified copy abide the further order of the court.

* * * * * * *

842 And be it remembered that heretofore, to wit, on the eleventh day of September, in the year of our Lord one thousand eight hundred and seventy-two, came Henry W. Kingsbury, by Henry Crawford and E. S. Isham, his attorneys, and filed in said supreme court a certain transcript of the record and proceedings of the circuit court of the county of Cook in the words and figures following, to wit:

* * * * * * *

843 And afterwards, to wit, at the October term, to wit, on the 13th day of November, A. D. 1871, the following, among other, proceedings were had in said court and entered of record, to wit:

No. 1.

Decree for Partition. Entered November 13, *A. D.* 1871.

HENRY W. KINGSBURY, by His Next Friend, CORYDON BECKWITH,
vs.
AMBROSE E. BURNSIDE, MARY K. BUCKNER, SIMON B. Buckner, Jane C. Kingsbury, John J. D. Kingsbury, Eva Lawrence, and Albert G. Lawrence. } Original Bill.

MARY K. BUCKNER and SIMON B. BUCKNER
vs.
HENRY W. KINGSBURY, EVA LAWRENCE, ALBERT G. LAWRENCE, and JANE C. KINGSBURY. } Cross-Bill.

844 This cause coming on to be heard upon the original bill of complaint, the answers and replications thereto, the cross-bill of complaint, the answers and replications thereto, the evidence, exhibits, and the mandate and opinion of the supreme court, and the court being now sufficiently advised in the premises, and in pursuance of the special directions of the supreme court in its mandate and opinion filed herein—

It is by the court ordered, adjudged, and decreed that the original bill of complaint be dismissed for want of equity.

And it appearing to the satisfaction of the court that the complain-ts in the cross-bill executed the deed bearing date May 15, 1861, to Henry W. Kingsbury, deceased, a copy of which was attached to the cross-bill and to the deposition of Simon B. Buckner as Exhibit "A," and that the same was a deed of trust conveying the premises therein described to the grantee for the use and benefit of the grantors, to be conveyed upon request; that the said
845 trustee, Henry W. Kingsbury, died testate September 18th, 1862, leaving the defendant, Eva Lawrence, his widow, and that a posthumous child was born of said widow on December 16th, 1862, who was named Henry W. Kingsbury, and is the complainant in the original bill and one of the defendants to the cross-bill, to whom the legal title of the premises described in said deed descended by inheritance; that the complainant in the cross-bill, Simon B. Buckner, is the equitable owner of a life estate in the real estate and premises hereinafter described, and that the other complainant in the cross-bill, Mary K. Buckner, is the equitable owner in fee of the same premises, subject to the said life estate, both of said estates being subject to the dower right of the defendant, Jane C. Kingsbury, and that Henry W. Kingsbury, the infant defendant to the cross-bill, now holds the legal title to the same real estate and premises as a trustee for the complainants in the cross-bill, according to their respective estates therein; and it further appearing to the court that the complainant in the cross-bill, Simon B. Buckner, had of-

fered to waive his life estate, so that the sole control and
846 benefit of said property might be confirmed upon his wife, the said Mary K. Buckner, her heirs and assigns—

And in further pursuance of the mandate and direction of the supreme court aforesaid—

It is further ordered, adjudged, and decreed that John Woodbridge, master in chancery of this court, make, execute, acknowledge, and deliver a deed in and by which he shall convey for and in behalf of Henry W. Kingsbury the infant defendant to the cross-bill, to Mary K. Buckner, one of the complainants in the cross-bill, her heirs and assigns, the following-described real estate, together with the appurtenances and hereditaments thereto belonging, to wit: One undivided half of lots five (5) and six (6), in block number thirty-five (35), in the original town of Chicago, in the county of Cook and State of Illinois; and also one undivided half ($\frac{1}{2}$) of the "Kingsbury tract," so called, being the tract of thirty-five acres, more or less, purchased from James Kinzie by the late Major Julius J. B. Kingsbury, of the United States Army, as per deed of said Kinzie, recorded
847 in the clerk's office of Cook county, Illinois, the said tract being the north half of what remained of the east half ($\frac{1}{2}$) of the northwest quarter ($\frac{1}{4}$) of section nine (9), in township thirty-nine (39), range fourteen (14), in said Cook county, after deducting therefrom the town of Wabousia, and being the same property described in the said deed of May 15, 1861, by Simon B. Buckner and Mary K. Buckner to Henry W. Kingsbury, deceased, recorded May 17, 1861, in Book 212 of Deeds, at page 624, in the records of deeds of Cook county, Illinois, divested of any life estate in Simon B. Buckner, her husband, he having renounced the same as aforesaid, and of all right of dower in Eva Lawrence, one of the defendants in the cross-bill.

And it further appearing to the court from the evidence produced and taken in open court that all of the east half of the northwest quarter, in section nine, in township thirty-nine north, of range fourteen east, of the third principal meridian, in Cook county, Illinois, lying south of the centre of Ontario street, in the city
848 of Chicago, in said county, and east of the North Branch of the Chicago river is included in and a part of the premises described in a deed set forth in the cross-bill and read in evidence, executed by James Kinzie and wife to Julius J. B. Kingsbury, dated May 30, 1833, and recorded May 30, 1833, in Book "A," page 139, in the records of deeds in Cook county, Illinois; and it further appearing to the court from the evidence that the infant defendant to the cross-bill, Henry W. Kingsbury, is the owner in fee simple, subject to the dower right of the defendant, Jane C. Kingsbury, and the dower right of the defendant, Eva Lawrence, of the following-described real estate, to wit: One undivided half of lots five (5) and six (6), in block number thirty-five (35), in the original town of Chicago, in Cook county, Illinois, and also one undivided half of all that part of the east half of the northwest quarter of section nine (9), in township thirty-nine north, of range fourteen east, of the third principal meridian, which lies south of the center of Ontario street,

in the city of Chicago aforesaid, and east of the North Branch
849 of the Chicago river, and that the said Mary K. Buckner, one of the complainants in the cross-bill, is the equitable owner in fee, subject to the right of dower of the said Jane C. Kingsbury, of the other undivided half of the lots and lands above described, and that upon the execution and delivery of the deed ordered by this decree she will also become the legal owner thereof—

It is further ordered, adjudged, and decreed that partition be made of the premises last hereinbefore described, so owned by the said Henry W. Kingsbury and Mary K. Buckner as tenants in common between them, and that Edwin A. Sheldon, Julian S. Rumsey, and John Forsythe be, and are hereby, appointed commissioners to fairly and impartially make partition of said real estate, assigning to the said Henry W. Kingsbury, by metes and bounds or other appropriate description, his share of said lots and tract of land, subject to the right of dower of said Jane C. Kingsbury, and also of the right of dower of said Eva Lawrence, taking into consideration the quantity and quality and value of the premises
850 and the encumbrances thereupon, if the same can be done consistently with the interests of the estate, and assigning to said Mary K. Buckner her share thereof by metes and bounds or other appropriate description, subject to the right of dower of said Jane C. Kingsbury, taking into consideration the quantity, quality, and value of the premises and the encumbrances thereupon, if the same can be done consistently with the interests of the estate, giving to the said Henry W. Kingsbury and the said Mary K. Buckner each one-half of the said real estate, subject to the dower rights aforesaid, and that the said commissioners proceed to take the oath required by law and make such partition as soon as the deed herein ordered shall be executed and delivered by the master in chancery, and report in the manner directed by the statutes of this court.

And it is further ordered and decreed that Eva Lawrence, one of the defendants to the cross-bill, be enjoined and restained from asserting any claim for dower in the property or share adjudged or awarded to the said Mary K. Buckner either before or after
851 partition shall be made.

And it is further ordered and decreed by the court that the question in regard to the taking of an account between the parties to the cross-bill and the costs and in regard to dower of Jane C. Kingsbury be reserved for the further order of the court.

And afterwards, to wit, on the 22nd day of January, A. D. 1872, said commissioners filed in said court their certain report as follows, to wit:

No. 2.

Commissioners' Report.

STATE OF ILLINOIS, } ss:
Cook County, }

Circuit Court of Cook County. January Term, 1872.

HENRY W. KINGSBURY, by His Next Friend, CORYDON BECKWITH,
vs.
AMBROSE E. BURNSIDE, MARY K. BUCKNER, SIMON B. Buckner, Jane C. Kingsbury, John J. D. Kingsbury, Eva Lawrence, and Albert G. Lawrence. } Original Bill.

852 MARY K. BUCKNER and SIMON B. BUCKNER
vs.
HENRY W. KINGSBURY, EVA LAWRENCE, ALBERT G. LAWRENCE, and JANE C. KINGSBURY. } Cross-Bill.

To the circuit court in and for the county of Cook, in the State of Illinois, in chancery sitting:

The undersigned, Edwin H. Sheldon, Julian S. Rumsey, and John Forsythe, commissioners appointed by a decree entered by the circuit court of Cook county aforesaid in the above-entitled cause on the 13th day of November, A. D. 1871, to make partition of the premises therein described between Henry W. Kingsbury and Mary K. Buckner, a certified — of which is hereto attached and made a part of this report, would respectfully report to the circuit court in, chancery sitting, in and for the county of Cook and State of Illinois, that, as directed by said decree and in pursuance
853 of the provisions of the statutes of *of* this State, they severally took an oath, on the 22nd day of November, 1871, before David Walsh, a justice of the peace in and for the county of Cook and State of Illinois, to fairly and impartially make partition between Henry W. Kingsbury and Mary K. Buckner of the lots and premises in said decree described in accordance with the judgment of the court and the direction of the decree, as to the rights and interests of said parties, if the same can be done consistently with the interests of the estate, and to fairly and impartially appraise the value of said premises, as will more fully appear by the several oaths, in writing, subscribed respectively by us, with the jurat, signed by the said justice of the peace, thereto attached and made a part of this report, and that after being so qualified they have gone upon the premises described in said decree and have made partition of the lots, lands, and premises described in said decree, taking into consideration the quantity, quality, and value of said premises and the incumbrances thereon, in the manner described in
854 said decree between said Henry W. Kingsbury and Mary K. Buckner, and they have allotted and assigned to the said

Henry W. Kingsbury the following portions and parcels thereof, to wit:

First. All of lots number six (6), in block number thirty-five (35), in the original town of Chicago, and also the north forty-one and six-tenths ($41\frac{6}{10}$) feet of lot five (5), in said block thirty-five (35), in the original town of Chicago.

Second. All that piece and parcel of the east half of the northwest quarter of section nine (9), in township thirty-nine (39) north, of range fourteen east, of the third principal meridian, included in the following-described boundaries, to wit: Commencing at a point on the east line of said northwest quarter of said section nine three (3) feet north of the center of Ontario street and running thence west on a line three feet north of the center of Ontario street to the center of Kingsbury street (which is the northern boundaries of the tract of land in said east half of said northwest quarter of
855 section nine to be divided between the said Henry W. Kingsbury and Mary K. Buckner, as appears by the plat hereto attached); thence running southeasterly along the center of said Kingsbury street to a point on the center line of Ohio street extended; thence east along the center of Ohio street to the east line of said northwest quarter of section nine, and thence north along said east line to the place of beginning.

Third. All that portion and parcel of said east half of said northwest quarter section included in the following-described boundaries, to wit: Commencing at a point on the east line of said quarter section at the center of Indiana street and running thence west along the center of Indiana street to the center of Kingsbury street; thence southeasterly along the center of Kingsbury street to a point on the center line of Illinois street extended; thence east along the center of Illinois street to the east line of the said northwest quarter section, and thence north along the east line of said northwest quarter section to the place of beginning.

856 All that portion and parcel of said east half of said northwest quarter section included in the following-described boundaries, to wit: Commencing on the north line of Kinzie street at a point one hundred (100) feet west from the corner of Kinzie and Kingsbury street and running thence northwesterly on a line parallel with the dock line of the east bank of the North Branch of the Chicago river one hundred and fifty (150) feet; thence west on a line parallel with the north line of Kinzie street to the said dock line of said river, and thence southeasterly along said dock line one-hundred and fifty (150) feet to the north line of said Kinzie street to the place of beginning; and all the rights of said Henry W. Kingsbury and Mary K. Buckner lying south of the north line of said tract in this paragraph described extended to the west bank of said river and west of the easterly line of said tract extended to the center of Kinzie street.

Fifth. All that portion and parcel of said east half of said
857 northwest quarter section included in the following-described boundaries, to wit: Commencing on the dock line of said east bank of said river one hundred and fifty (150) feet nortwesterly

from the intersection of said dock line with the north line of Kinzie street and running thence northwesterly along said dock line three hundred and $\frac{5}{10}$ feet; thence northeasterly to a point on the west line of Kingsbury street three hundred and seventy-five (375) feet from the southwest corner of Kingsbury and Indiana streets; thence southeasterly along the west line of Kingsbury street four hundred and seven (407) feet, and thence west on a line parallel with the north line of Kinzie street to the place of beginning, and all the right of said Henry W. Kingsbury and Mary K. Buckner lying between the north and south lines of the tract in the paragraph described extended to the west line of said river and to the center of Kingsbury street.

Sixth. All that portion and parcel of said east half of said
858 northwest quarter section included in the following-described boundaries, to wit: Commencing on the dock line of said east bank of said river two hundred and thirty-one (231) feet northwesterly from the intersection of the north line of Indiana street with said dock line and running thence along the dock line northwesterly to the northern boundary of the tract in said east half of said northwest quarter of section nine aforesaid, to be divided between the said Henry W. Kingsbury and Mary K. Buckner, which strikes the dock line at right angles in the manner shown by the map hereto attached; thence running northeasterly and east along said northern boundary line to the west line of Kingsbury street; thence southeasterly along the west line of Kingsbury street three hundred and forty-three (343) feet, and thence southwesterly in a direct line to the place of beginning; and all of the rights of said Henry W. Kingsbury and Mary K. Buckner lying north of the south line of the tract of land in this paragraph described extended to the center of Kingsbury street and to the west bank of said river.

859 To the said Mary K. Buckner the following-described portions and parcels of said premises, to wit:

First. The south one hundred and forty (140) feet of lot five (5), in block thirty-five (35), in the original town of Chicago.

Second. All that parcel of land included in the following-described boundaries, to wit: Commencing at a point on the east line of the east half of the northwest quarter of section nine (9), in township thirty-nine (39) north, of range fourteen (14) east, of the third principal meridian, at the center of Ohio street and thence running west along the center of Ohio street to the center of Kingsbury street, and thence southeasterly along the center of Kingsbury to the center of Indiana street, and thence east along the center of Indiana street to the east line of the said east half of said northwest quarter section, and thence north along said east line to the place of beginning.

860 Third. All that parcel of land included in the following-described boundaries, to wit: Commencing on the east line of said east half of the northwest quarter section aforesaid at the center of Illinois street and running thence along the center of said Illinois street to the center of Kingsbury street, and thence southeasterly along the center of Kingsbury street to the center of Kinzie street, and thence east along the center of Kinzie street to the southeast

corner of said section nine, and thence north along the said east line of said east half of said northwest quarter section to the place of beginning.

Fourth. All of that parcel of land included in the following-described boundaries, to wit: Commencing at a point on the north line of said Kinzie street one hundred (100) feet west from the west line of Kingsbury street and running northwesterly in a line parallel with the dock line of the east bank of the North
861 Branch of the Chicago river one hundred and fifty (150) feet; thence east on a line parallel with the north line of Kinzie street to the west line of Kingsbury street, and thence southeasterly along the west line of Kingsbury street to the north line of Kinzie street, and thence west along the north line of Kinzie street to the place of beginning; and all the rights of said Henry W. Kingsbury and Mary K. Buckner in front of said parcel of land to the centers of Kinzie and Kingsbury streets.

Fifth. All that parcel of land included in the following-described boundaries, to wit: Commencing at a point on the dock line of the said east bank of said river four hundred and fifty and five-tenths ($450\frac{5}{10}$) feet northwesterly from the intersection of said dock line with the south line of Indiana street and running thence northwesterly along said dock line to a point two hundred and thirty-one (231) feet northwesterly from its [the] point where the north line of Indiana
862 street intersects with said dock line (making 475 feet of dock front south of Indiana street and 231 feet of dock front north of Indiana street), and thence running northeasterly to the west line of Kingsbury street at a point three hundred and forty-three (343) feet southeasterly from the point where the north boundary line of the tract in said east half of the said northwest quarter to be divided between Henry W. Kingsbury and Mary K. Buckner intersects the west line of Kingsbury street, and two hundred and ninety-seven (297) feet northwesterly, where the north line of Indiana street intersects the west line of Kingsbury street, and across Indiana street seven hundred and fifty-seven and $\frac{85}{100}$ (757.85) feet from the northwest corner of Kinzie and Kingsbury treets, measured along the west line of Kingsbury street, and thence southwesterly to the place of beginning; and all the rights of said Henry W. Kingsbury and Mary K. Buckner between the north and south lines of the parcel of land in this
863 paragraph described extended to the center of Kingsbury street and to the west bank of said river.

And they further report that they find the following incumbrances on the real estate and premises described in said decree, and they have divided and allotted them as heretofore stated, to wit:

First. On the west fifty feet of lot six (6), in block thirty-five (35), in the original town of Chicago, allotted to said Henry W. Kingsbury, a deed of trust dated August 1st, 1855, to James Clapp to secure the payment of ten thousand dollars to John N. A. Griswold, which has been assigned to Thomas Swan, and such indenture draws interest at the rate of eight per cent. per annum, and the principle was due on the first day of August last; and said incumbrance is allotted to Henry W. Kingsbury, and he is to pay the whole sum thereon.

Second. On lot six (6) aforesaid, allotted to said Henry W.
864 Kingsbury, a mortgage dated November 15, 1855, to Joseph P. Taylor to secure the payment of a promissory note for ten thousand dollars to him, which has been assigned to Albert G. Lawrence and by him to Edward A. Haddock, and that such debt draws interest at the rate of eight per cent. and is to become due on a note of six months, and said incumbrance is allotted to said Henry W. Kingsbury, and he is to pay the whole sum thereon.

Third. On lot six (6) aforesaid, allotted to the said Henry W. Kingsbury, a mortgage dated September 15, 1860, to Fanny W. Bishop to secure the payment of thirty thousand dollars, which has been assigned to Mary R. Burnside, wife of Ambrose E. Burnside, and said sum, with the accrued interest, has been settled at thirty-eight thousand dollars, and to draw seven per cent. interest, and the principle becomes due September 15, 1872, and said incumbrance is allotted to the said Henry W. Kingsbury, and he is to pay the whole amount due thereon.

865 Fourth. On the dock property in the North Branch of the Chicago river, near the north end of the tract, on the east half of the northwest quarter of section nine aforesaid, to be divided between the said Henry W. Kingsbury and Mary K. Buckner, being one hundred feet on the river and seventy feet on Kingsbury street, allotted to Henry W. Kingsbury, a mortgage dated April 5, 1856, to John B. Tolman to secure the payment of five thousand dollars to him, which indebtedness and mortgage has been — to George William Brown and Frederick W. Brown, trustees, and the indebtedness draws interest at the rate of eight per cent. and becomes due July 31, 1872, and said incumbrance is allotted to the said Henry W. Kingsbury, and he is to pay the whole sum due thereon.

Fifth. On the east seventy-five feet of the block between Ontario and Ohio streets, a part of the east half of the northwest quarter of section nine aforesaid, as shown by the map hereto attached,
866 allotted to the said Henry W. Kingsbury, a mortgage dated July 1, 1860, to A. P. Hill to secure the payment of seven thousand dollars, according to a bond described therein, which now belongs to Keitty G. Forsyth, is due, and draws interest at the rate of eight per cent., and said incumbrance is allotted to the said Henry W. Kingsbury, and he is to pay the whole sum due thereon.

Sixth. On a part of said east half of said northwest quarter of section nine aforesaid described as follows: Commencing on the north side of Kinzie street, at the center of the North Branch of the Chicago river, running thence north along the center of said North Branch to a point one hundred and fifty feet distant from the place of beginning; thence east to the center of Payton street (sometimes called East Water, but now called Kingsbury street); thence along the center of Payton street to the north line of Kinzie street; thence west along the north line of Kinzie street to the center of the
867 North Branch of said North Branch [Chicago river] the place of beginning, one-half in value of which is allotted to the said Henry W. Kingsbury and the other half — the said Mary K. Buckner, an incumbrance created by a deed of trust to Thomas

Swan, dated April 21, 1864, to secure the payment of ten thousand dollars which became due April 15, 1871, and draws interest at the rate of eight per cent. per annum, and said incumbrance is divided equally between the said Henry W. Kingsbury and Mary K. Buckner, and each is to pay one-half the sum due thereon.

Seventh. On lot five (5), block thirty-five (35), in the original town of Chicago, forty and six-*th*enths feet of which is allotted to Henry W. Kingsbury and one hundred and forty feet to Mary K. Buckner, a mortgage dated November 1, 1859, to C. H. R. Deringh to secure thirty-seven thousand five hundred dollars, which has been assigned to trustees of the Liverpool and London and Globe Insurance Company, which draws interest at the rate of eight per cent., and the principal became due November 1, 1871, and said incum-
868 brance is allotted to Mary K. Buckner, and she is to pay the whole sum due thereon, and the said Henry W. Kingsbury is to be kept harmless therefrom.

Eighth. On a part of said east half of the northwest quarter of section nine described as that part of the dock front between Kingsbury street and the river north of a line drawn from a point on the west line of Kingsbury street two hundred feet from its intersection with Indiana street, at right angles thereto, and south of Indiana street, being two hundred feet on Kingsbury street and about three hundred feet on the river, allotted to Mary K. Buckner, a mortgage to George W. Cullem to secure the payment of twenty thousand dollars, the principal of which is now twenty-five thousand and fifty dollars, and draw- interest at the rate of eighteen hundred and sixty dollars per annum, and the principal is due, and said incumbrance is allotted to Mary K. Buckner, and she is to pay the whole sum due thereon.

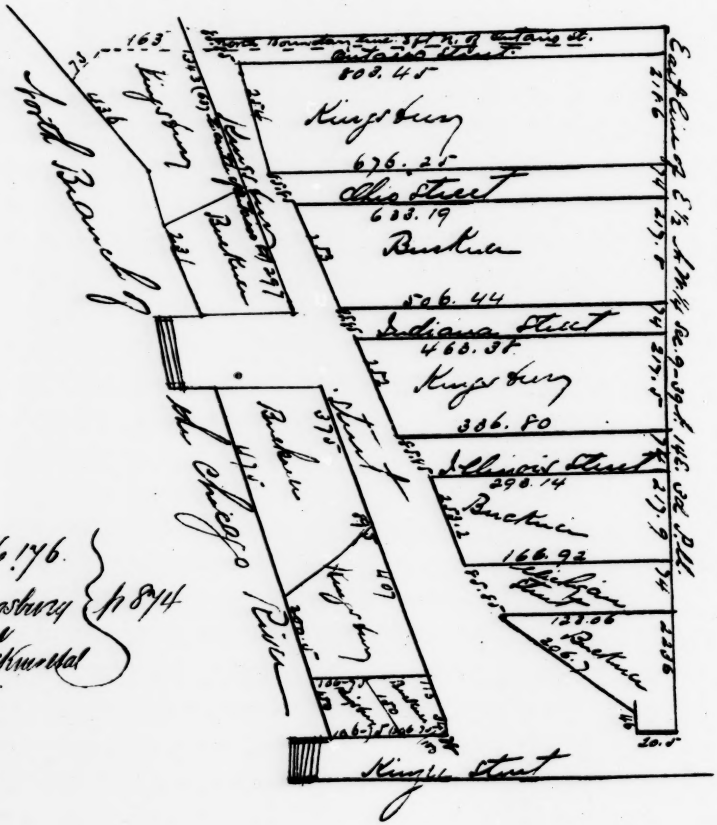
869 Ninth. On the west four hundred feet of the front on Indiana street by one hundred feet deep in said east half of the northwest quarter aforesaid, allotted to Mary K. Buckner, a mortgage dated January 1, 1860, to John Cunningham to secure ten thousand dollars, which becomes due January 1, 1875, and bears interest at the rate of eight per cent., and said incumbrance is allotted to Mary K. Buckner, and she is to pay the whole sum due thereon.

And they further report that the interest has been paid from the rents and profits of the lands and estate described in the decree, except some arrearages of interest accruing or accrued, and in making the partition and allotting the shares as divided and determined which party should pay the incumbrances aforesaid they have only considered the principal sums due, leaving the interest to be paid to the time this report shall be confirmed from the joint rents and profits aforesaid.

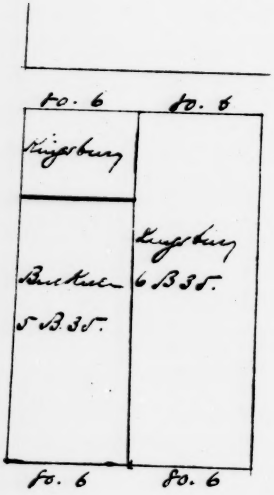
870 And they further report that at the request of Isaac N. Arnold, the guardian of Henry W. Kingsbury, with the consent of Mary K. Buckner, they have divided the said tract of land described in the deed of trust to Thomas Swan and lying next north of Kinzie street and west of Kingsbury street into two parts or shares of equal value and allotted one to each party.

And they further report that they have estimated the value of the

Map of the Kingsbury Tract



Map
of Lots 5 & 6 B. 35, Original Town of
Chicago.



No 176.
Kingsbury
&
Buckner et al
} pt 873

Randolph St.

property described in said decree and fixed the same at the sum of twelve hundred and eighty-two thousand two hundred and eighteen dollars and fifty cents ($1,282,218.50), subject to the incumbrances aforesaid, the principals of which amount in the aggregate to the sum of one hundred and fifty-two thousand five hundred and fifty dollars, leaving the net value of said property at the sum of eleven hundred and twenty-nine thousand six hundred and sixty-eight dollars and fifty cents; and the lands and property allotted to the said Henry W. Kingsbury they find to be of the net value
871 of five hundred and sixty-four thousand eight hundred and thirty-four dollars and twenty-five cents; and the lands and property allotted to the said Mary K. Buckner they find to be of the net value of five hundred and sixty-four thousand eight hundred and thirty-four dollars and twenty-five cents.

And they further report that brick buildings were standing on lots five and six, in block thirty-five, in the original town of Chicago, which were destroyed by fire on the 8th and 9th days of October, 1871, leaving certain bricks, stone, and iron materials on the ground, and that they have not considered or included the value of such materials in making this partition or division, or divided them between the parties, having considered them as personal property.

And they further report that they have caused a survey of the premises to be made by Walcott and Fox, surveyors, to attain the necessary information to be used in making such partition, and they attach hereto maps and plats containing such portions
872 of said survey as they deem material, and indicating these on the several parcels into which the same has been divided, and they make the same a part of this report.

All of which is respectfully submitted for the consideration of the court.

January 18, 1872.

(Signed) EDWIN H. SHELDON. [SEAL.]
JULIAN S. RUMSEY. [SEAL.]
JOHN FORSYTHE. [SEAL.]

* * * * * * *

(Here follow diagrams marked pp. 873 & 874.)

875 * * * * * * *

And afterwards, to wit, at the January term, to wit, on the 12 day of February, A. D. 1872, the following, among other, proceedings were had in said court and entered of record, to wit:

No. 3.

Decree Confirming Commissioners' Report.

STATE OF ILLINOIS, } ss:
Cook County, }

Circuit Court. January Term, A. D. 1872. In Chancery.

HENRY W. KINGSBURY, by His Next Friend, CORYDON BECKWITH,
vs.
AMBROSE E. BURNSIDE, MARY K. BUCKNER, SIMON B. Buckner, Jane C. Kingsbury, John J. D. Kingsbury, Eva Lawrence, and Albert G. Lawrence. } Original Bill.

876 MARY K. BUCKNER and SIMON B. BUCKNER
vs.
HENRY W. KINGSBURY, EVA LAWRENCE, ALBERT G. LAWRENCE, and JANE C. KINGSBURY. } Cross-Bill.

This cause coming on again, and it appearing to the court from the report of John Woodbridge, master in chancery, that he has executed, acknowleged, and delivered a deed, dated November 14, A. D. 1871, to Mary K. Buckner for and in behalf of Henry W. Kingsbury, in pursuance of the decree entered herein on the 18th day of November, 1871, conveying the premises and real estate therein described, and no exceptions having been taken to such report except as herein stated; and it further appearing to the court that the said master in chancery has made such deed and delivered it in accordance with the provisions and directions of said decree: Therefore—

It is by the court ordered, adjudged, and decreed that said
877 deed and report be ratified, approved, and confirmed except in regard to the following-described tract—said property is described as follows, to wit: Those certain premises situate in Chicago, Cook county, State of Illinois, described as follows, to wit: Commencing at the north side of Kinzie street, at the center of the North Branch of the Chicago river, running thence north along the center of said North Branch to a point 150 feet distant from the place of beginning; thence east to the center of Payton street (sometimes called East Water); thence along the center of Payton street to the north line of Kinzie street, to the center of said North Branch, the place of beginning.

And it further appearing to the court from the report of Edwin H. Sheldon, Julian S. Rumsey, and John Forsythe, commissioners appointed in and by the decree entered herein on the 13th day of November, 1871, to make partition of the real estate and premises described therein between Henry W. Kingsbury and Mary K.
878 Buckner, that they have, in pursuance of the directions of said decree, made a partition of the real estate and premises

therein described; and no exceptions having been made to said report or partition except to a part thereof, to which exceptions have been filed by Henry W. Kingsbury, by his guardian, as will more fully appear by such exceptions, which have been reserved for further consideration, as hereinafter stated; and it appearing to the satisfaction of the court that the said commissioners severally took oath before Daniel Walsh, a justice of the peace in and for the county of Cook and State of Illinois, on the 22nd day of November, 1871, to fairly and impartially make partition between Henry W. Kingsbury and Mary K. Buckner of the lots and premises in said decree described, in accordance with the judgment of the court and the directions of said decree, as to the rights and interest of said parties, if the same can be done consistently with the interests of said estate, and to fairly and impartially appraise the value of said lots,
879 lands, and premises described in the decree, taking into consideration the quantity, quality, and value of said premises and the incumbrances thereon, in the manner directed by said decree, between said Henry W. Kingsbury and Mary K. Buckner, and allowed to each of them one-half of said lots, lands, and premises, and apportioned and allotted the incumbrances thereon so as to make a just, impartial, and equal partition and division of said lots, lands, and premises and the incumbrances thereon, subject to the right of dower of the said Jane C. Kingsbury, in all respects according to the provisions of law and said decree: Therefore—

It is by the court ordered, adjudged, and decreed that said report and all the acts and doings of said commissioners as herein reported be ratified, approved, and confirmed, except as hereinafter provided.

And it is further ordered, adjudged, and decreed that the
880 said Henry W. Kingsbury and his assigns be vested, and the court doth by this decree invest him and his assigns, with the title in fee simple, subject to the right of dower of the said Jane C. Kingsbury, and also subject to the right of dower of his mother, Eva Lawrence, to the following-described real estate and premises, to wit:

(Here follows that part of the commissioners' report allotting certain lands to Henry W. Kingsbury. See *ante.*)

And that the said Mary K. Buckner and her assigns be vested, and the court doth by this decree invest her and her assigns, with the title in fee simple, subject to the right of dower of the said Jane C. Kingsbury to the following-described real estate and premises, to wit:

(See commissioners' report, *ante.*)

And it appearing to the satisfaction of the court from said report of said commissioners and the evidence heard in open court that there are certain incumbrances on the property described in
881 said decree hereinafter mentioned and described, and which have been considered by said commissioners in making the partition, and that they have fairly and impartially divided and allotted such incumbrances to the said Henry W. Kingsbury and Mary K. Buckner: Therefore—

It is further ordered, adjudged, and decreed that the said Henry

W. Kingsbury pay the indebtedness and the interest to accrue thereon from the date of the entry of this decree herein next set forth—that is to say: (Here follows that part of said commissioners' report allotting certain incumbrances to Henry W. Kingsbury. See *ante.*)

And it is ordered, adjudged, and decreed that the said Henry W. Kingsbury shall save and keep harmless the said Mary K. Buckner, her heirs and assigns, and all persons claiming the said premises by this decree allotted to and vested in her or any part thereof, from any liability upon such indebtedness.

882 And it is further ordered, adjudged, and decreed that the interest on all of said above-mentioned indebtedness as assigned and allotted to said Henry W. Kingsbury and Mary K. Buckner accrued at the date of the entry of this decree be paid by and from the joint rents and profits of said real estate divided by this decree heretofore accrued.

And it is further ordered and decreed that nothing in this decree shall be construed as releasing the said Jane C. Kingsbury or Eva Lawrence from any present obligation to pay any part of such indebtedness or as entitling them or either of them to dower free from the incumbrance aforesaid.

And it is further ordered, adjudged, and decreed that the possession of the land and lots set off and allotted to the said Mary K. Buckner and described in this decree be surrendered to her or her assigns by the said Henry W. Kingsbury or by such person or persons as claim under him or hold possession thereof for him, and the

883 clerk of this court shall issue a writ of assistance or possession as in case of judgment in actions in ejectment; and it appearing to the court that there is an error in the final decree entered on the 13th day of November, 1871, in describing the tract of land in the east half of the northwest quarter of section nine aforesaid by fixing the northern boundary at the center of Ontario street and the western boundary at the east bank of the North Branch of the Chicago river—

It is ordered that said decree be amended and corrected so as to make the descriptions of said tract to be divided the same as contained in this decree and the reports of the commissioners.

And it is further ordered, adjudged, and decreed that the said Henry W. Kingsbury pay the costs which accrued in this cause down to and including the decree entered on the 13th day of November, 1871, to be taxed by the clerk, and that the costs and expenses which have accrued since the entry of said decree

884 shall be paid equally by the said Henry W. Kingsbury and Mary K. Buckner, each paying one-half thereof, the same to be taxed by the clerk and to include the sum of one hundred dollars for each of the commissioners who have made the partition, and eighty-five dollars paid Walcott and Fox, surveyors, and all questions as to costs to accrue after the date of this decree are reserved for further determination.

And it is further ordered, adjudged, and decreed that the said Eva Lawrence be barred, enjoined, and restrained from asserting

or claiming dower in the several parcels of land set off to and vested in Mary K. Buckner and described in this decree, and that her right of dower be limited to the several parcels set off to and vested in Henry W. Kingsbury.

And the said Henry W. Kingsbury, by his guardian *ad litem*, having filed exceptions to the report of the master in chancery,
885 so far as it shows a conveyance of the tract next *next* hereinafter described and to that part of the report of the commissioners which divides into two equal parts the following tract of land, to wit, that part and parcel of the said east half of said northwest quarter of section nine aforesaid, included in the following-described boundaries, to wit: Commencing in the center of the North Branch of the Chicago river on the north line of Kinzie street and running thence northwesterly along the center of said river one hundred and fifty (150) feet; thence east on a line parallel with the north line of Kinzie street to the center of Kingsbury street; thence along the center of Kingsbury street southeasterly to the north line of Kinzie street, and thence west along the north line of Kinzie street to the place of beginning, and allot one part thereof to Mary K. Buckner, claiming to be the sole owner of said parcel of land; and having moved for leave to take evidence in support of the exceptions, and the said Mary K. Buckner
886 having made objections to the allowance of such exceptions or any of them, claiming that the said Henry W. Kingsbury is concluded and stopped by the pleadings and decree heretofore entered from asserting such claim and denying that he is the sole owner of said parcel of land and denying the allegations contained in such exceptions on which the said Henry W. Kingsbury vests his claim of sole ownership, and because the court is not informed as to the fact thereto, *and* it is ordered that the consideration and hearing of said exceptions be postponed; and leave is given to both parties to take evidence in support of or in opposition to said exceptions without prejudice, and that the said Henry W. Kingsbury take and file the testimony on his part within ninety days and the said Mary K. Buckner within one hundred and twenty days after the entry of this decree.

And it is further ordered that neither the execution of this decree nor the writ of assistance or possession nor other proceedings in this cause shall be stayed because of the pending of the
887 questions raised by such exceptions.

And the said Mary K. Buckner waives any and all objections as to the mode of presenting the questions as to the sole ownership of said tract or parcel of land by exceptions to the report as aforesaid, protesting that such questions cannot at this stage of the proceedings be heard in any mode or the alleged fact proved by parol evidence, and reserving all other objections whatever.

And it is mutually agreed that an appeal may be prosecuted by either party from the decisions of the court on such exceptions without interfering with this decree or the partition of all portions of said property (other than said tract or parcel of land) now approved by the court, and that a writ of error may be prosecuted therefrom

within sixty days, but not afterwards; and it is virtually agreed by all parties that no error shall be assigned upon any appeal or writ of error because of the approval of a part of the report of the
888 commissioners and the reservation *the reservations* of the exceptions as to the other part thereof.

And it appearing to the court that there are building materials consisting of stone, brick, and iron left from the buildings and improvements on lots five and six, in block thirty-five, in the original town of Chicago, destroyed by fire on the 8th and 9th days of October, 1871, which belongs jointly to the said Henry W. Kingsbury and Mary K. Buckner, which have not been divided, it is further ordered, adjudged and decreed, that all questions thereto be postponed and reserved.

And it appearing that there were policies of insurance on said buildings, and the rents thereof, which have been partly collected thereon,—are in the hands of John Woodbridge, receiver of this court, appointed in another cause wherein the said Jane C. Kingsbury is complainant and Henry W. Kingsbury, Eva Lawrence, Albert G. Lawrence, and David J. Lake are defendants, and Henry W.
889 Kingsbury is complainant in a cross-bill and Jane C. Kingsbury, Eva Lawrence, Albert G. Lawrence, and David J. Lake are defendants thereto, and that said receiver has paid a sum of money for a building on said lot five, in block thirty-five aforesaid, and has contracted a debt to raise said sum of money—

It is ordered that said John Woodbridge, receiver, report to this court in this cause, under oath, a full and complete account of such policies, the amounts collected, and the condition of those uncollected, giving all the information in his possession with reference thereto, and also the sum paid for said building, the nature and amount of the debt contracted by him, and the payment, if any, made thereon, and all questions thereon are postponed and reserved for the further consideration of the court; and what, if any, contracts he has made in regard to the premises described; what other obligations or liabilities, if any, there are outstanding against the estate, and that he fully state all the facts in relation to said
890 joint property in round numbers, the moneys in hand belonging to said estate, both from rents and insurance.

* * * * * * *

And be it remembered that on the sixth day of November, in the year of our Lord one thousand eight hundred and seventy-two, came Mary Buckner, by Goudy and Chandler, her attorneys, and filed in said supreme court an additional transcript of the record and proceedings of the circuit court of the county of Cook in the words and figures following, to wit:

891 * * * * * * *

STATE OF ILLINOIS, } ss:
Cook County, }

The People of the State of Illinois to the sheriff of said county, Greeting:

Whereas the circuit court of Cook county, in the State of Illinois, on the 29th day of January, A. D. 1872, rendered a decree in a certain cause in chancery wherein Henry W. Kingsbury, by his
892 next friend, Corydon Beckwith, is complainant in the original bill and Ambrose E. Burnside, Mary J. Buckner, Simon B. Buckner, Jane C. Kingsbury, John J. D. Kingsbury, Eva Lawrence, and Albert G. Lawrence are defendants thereto, and Mary K. Buckner and Simon B. Buckner are complainants in a cross-bill, and Henry W. Kingsbury, Eva Lawrence, Albert G. Lawrence, and Jane C. Kingsbury are defendants thereto, in and by which decree the said court awarded and allotted in partition the premises and real estate hereinafter described to the said Mary K. Buckner, one of the complainants in said cross-bill, and ordered and decreed that the possession thereof be delivered to her, and that the clerk of said court issue a writ of possession or assistance therefor as in case of judgments in ejectments.

Therefore we command you that without delay you deliver to the said Mary K. Bucker possession of the following-described premises and real estate situate in the city of Chicago, county of Cook and State of Illinois, to wit:

893 First. The south one hundred and forty (140) feet of lot five (5), in block thirty-five (35), in the original town of Chicago.

Second. All that parcel of land included in the following-described boundaries, to wit: Commencing at a point on the east line of the east half ($\frac{1}{2}$) of the northwest quarter ($\frac{1}{4}$) of section nine (9), in township thirty-nine (39) north, of range fourteen (14) east, of the third principal meridian, at the center of Ohio street, and running thence west along the center of Ohio street to the center of Kingsbury street; thence southeasterly along the center of Kingsbury street to the center of Indiana street, and thence east along the center of Indiana street to the east line of said northwest quarter of section nine aforesaid, and thence north along said east line of said east half of said northwest quarter section to the place of beginning.

Third. All that parcel of land included in the following-described boundaries, to wit: Commencing on the east line of said
894 east half of the northwest quarter aforesaid at the center of Illinois street and running thence west along the centre of Illinois street to the center of Kingsbury street, and thence southeasterly and south along the center of Kingsbury street to the center of Kinzie street, and thence east along the center of Kinzie street to the southeast corner of said northwest quarter of said section nine, and thence north along the said east line of said east half of said northwest quarter of said section nine to the place of beginning.

Fourth. All that parcel of land included in the following-described boundaries, to wit: Commencing at a point on the dock line

of the east bank of the North Branch of the Chicago river four hundred and fifty-five and five-tenths (455.5) feet northwesterly from the intersection of said dock line with the north line of Kinzie street, and four hundred and seventy-five (475) feet southeasterly from the intersection of said dock line with the south line of Indiana street, and running thence northwesterly along the said dock line
895 to a point two hundred and thirty-one (231) feet northwesterly from the point where the north line of Indiana street intersects said dock line (making four hundred and seventy-five (475) feet of dock front south of Indiana street and two hundred and thirty-one (231) feet of dock front north of Indiana street); thence running northeasterly to the west line of Kingsbury street at a point three hundred and forty-three (343) feet southeasterly from the point where the north boundary line of the tract in said east half of said northwest quarter of said section nine divided by said decree between the said Henry W. Kingsbury and Mary K. Buckner intersects the said west line of Kingsbury street, and two hundred and ninety-seven (297) feet northwesterly from the point where the north line of Indiana street intersects the west line of Kingsbury street, running thence southeasterly along the west line of Kingsbury street and across Indiana street seven hundred and fifty seven and $\frac{85}{100}$ (757.85) feet to a point which is five hundred and fifty-four and $\frac{78}{100}$ (554.78) feet from the northwest corner of Kinzie and Kingsbury streets measured along the west line of Kingsbury street, and
896 thence southwesterly to the place of beginning; and all the right of said Henry W. Kingsbury and Mary K. Buckner between the north and south line of the parcel of land described in this paragraph extended to the center of Kingsbury street and to west bank of said river, with the appurtenances, and that you certify to the said court in what manner you shall have executed this writ within ninety days from this date, and have you then and there this writ.

Witness Norman T. Gassette, clerk of our said court,
[OFFICIAL SEAL.] and the seal thereof, at Chicago, in the said county and State, this 29th day of January, A. D. 1872.

NORMAN T. GASSETTE, *Clerk.*

Executed the within writ by taking possession of the within-described real estate and delivered possession thereof to the within-named Mary K. Buckner this 31st day of January, A. D. 1872.

T. M. BRADLEY, *Sheriff,*
By MARTIN BEST, *Deputy.*

897 Fees, $2.50, p'd by pl't'ff's att'y.

Received of T. M. Bradley, sheriff of Cook county, possession of the within-described property this 31st day of January, 1872.

MARY K. BUCKNER,
By GOUDY AND CHANDLER,
Her Attorneys.

Filed October 29, 1872.

NORMAN T. GASSETTE, *Clerk.*

* * * * * * *

898 In vacation, after September term, A. D. 1873.

HENRY W. KINGSBURY, by His Guardian *ad Litem*, ANSON SPERRY,
vs.
MARY K. BUCKNER — SIMON B. BUCKNER. } 352. Appeal from Circuit Court of Cook County.

On this day came again the said parties, and the court having diligently examined and inspected as well the record and proceedings aforesaid as to the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, are of opinion that in the record and proceedings aforesaid and in the rendition of the decree aforesaid there is manifest error. Therefore it is considered by the court for that error and others in the reports and proceedings aforesaid the decree of the circuit court of Cook county in this behalf rendered be reversed, annulled, set aside, and wholly for nothing esteemed, and that this cause be remanded to the circuit court of Cook county for such other and further proceedings as unto law and justice shall appertain; and it is
899 further considered by the court that the said appellant recover of and from said appellees his costs by him in this behalf expended, and that he have execution therefor.

At a term of the supreme court begun and held at Ottawa, in the State of Illinois, on the ninth day of September, in the year of our Lord one thousand eight hundred and seventy-three, within and for the northern grand division of said State.

Present: Sidney Breese, chief justice; Pinkney H. Walker, justice; John U. Scott, justice; William K. McAllister, justice; Benjamin R. Sheldon, justice; John Scholfield, justice; Alfred U. Craig, justice; Norman L. Freeman, reporter; James K. Edsall, att'y general; Cairo D. Trimble, clerk; A. C. McIntire, sheriff.

900 And, to wit, on the nineteenth day of September, in the year of our Lord one thousand eight hundred and seventy-three, the same being one of the days of said term, the court met pursuant to adjournment.

Present: As on the first day.

HENRY W. KINGSBURY, by ANSON SPERRY, Guardian,
vs.
MARY K. BUCKNER *et al.* } 80. Pet. for Rehearing.

And now, on this day, come appellees, by Goudy and Chandler, counsel, and move the court for a rehearing in this cause; which said motion, after having — examined and duly considered, — the motion and petitions filed herein, it is ordered a rehearing be allowed.

And, to wit, on the eighth day of November, in the year of our Lord one thousand eight hundred and seventy-three, the same being in vacation after September term, A. D. 1873.

901 HENRY W. KINGSBURY, by his Guardian, ANSON SPERRY,
vs.
MARY K. BUCKNER, SIMON B. BUCKNER, & JANE C. KINGSBURY.
80. Appeal from the Circuit Court of Cook County.

On this day again came the said parties, and the court, having diligently examined and inspected as well the record and proceedings aforesaid as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, are of opinion that in the record and proceedings aforesaid and in the rendition of all the orders and decrees rendered and entered in said cause by the said circuit court of Cook county prior to the 2nd day of August, A. D. 1872, there is no error. Therefore it is considered by the court that the said orders and decrees so rendered in the proceedings aforesaid prior to the 2nd day of August, 1872, be, and the same are, in all things affirmed.

And the court being further of the opinion that in the rendition of the decrees in the record and proceedings aforesaid on the
902 2nd day of August, A. D. 1872, there is manifest error—

Therefore it is considered by the court that, for that error and others in that record and proceedings aforesaid the decree so rendered on the 2nd day of August, A. D. 1872, by the circuit court of Cook county be reversed, annulled, and set aside and for nothing wholly esteemed, and that this cause be remanded to the circuit court of Cook county for such other and further proceedings as to law and justice shall appertain.

And it is further considered by the court that the said appellant recover one-half of the costs of and from the appellees, and have execution therefor, and that the appellees recover one-half the costs from the appellant, and have execution therefor.

903 I, Cairo D. Trimble, clerk of the supreme court in and for the northern grand division of the State of Illinois, do hereby certify that the foregoing is a true copy of the mandates and decrees of court below, commissioners' report, writ of possession, judgment of this court, order for rehearing, and second judgment thereon, contained in the transcript of proceedings of the circuit court of the county of Cook, filed on appeal entered September 11, A. D. 1872, in the said supreme court in the above-entitled cause, of record in my office.

Seal of the Supreme Court.

In testimony whereof I have set my hand and affixed the seal of the said supreme court, at Ottawa, this 10th day of May, in the year of our Lord one thousand eight hundred and seventy-eight.

C. D. TRIMBLE,
Clerk of the Supreme Court.

904 KINGSBURY *vs.* BUCKNER—EXHIBIT C.

STATE OF ILLINOIS,
Northern Grand Division, } ss:

In the Supreme Court, to September Term, 1872.

HENRY W. KINGSBURY, by Next Friend,
v.
AMBROSE E. BURNSIDE, MARY K. BUCKNER, SIMON B. Buckner, Jane C. Kingsbury, John J. D. Kingsbury, Eva Lawrence, Albert G. Lawrence. } Original Bill.

MARY K. BUCKNER, SIMON B. BUCKNER
vs.
HENRY W. KINGSBURY, EVA LAWRENCE, ALBERT G. LAWRENCE, JANE C. KINGSBURY. } Cross-Bill.

905 Appeal from cook circuit court.

And now comes the above-named Henry W. Kingsbury, by Anson Sperry, his guardian *ad litem*, and says that in the records and proceedings aforesaid there is manifest error, in this, to wit:

1. The court erred in rendering the decree of November 13, 1871.

2. That the said decree of Nov. 13, 1871, was rendered without proof against the said infant, Henry W. Kingsbury, and is contrary to law.

3. That the said decree of Nov. 13, 1871, is not in accordance with the mandate of the supreme court and was rendered without jurisdiction in the Cook circuit court.

4. That the court below erred in finding there were incumbrances upon the property described in the said decree without having the encumbrances before the court and without any evidence as to the existence, nature, validity, extent, or amount of such encumbrances or any of them.

5. That the said decree of Nov. 13, 1871, ordering a partition is wholly indefinite and void, in this, that it orders the said com-
906 missioners in partition to take into consideration the encumbrances on the said premises without any adjudication as to the amount, extent, validity, or nature of such incumbrances or any of them.

6. The court erred in decreeing any partition of said property without decreeing as to the said incumbrances and specifically decreeing their nature, validity, extent, and amount.

7. The court below erred in making said decree without disposing of the interests of said doweresses, Jane C. Kingsbury and Eva Lawrence.

8. The court below erred in receiving or acting on the pretended report of the commissioners in partition at the January term, 1872.

9. The land divided by the commissioners is not the same premises described in the decree, and the said commissioners had no

warrant or authority to divide the same, nor was the same embraced within their oath.

10. The said commissioners had no authority under the law or said decree of partition to determine the existence, validity,
907 extent, or amount of the incumbrances mentioned in their said report or any of them.

11. The said commissioners had no authority under law or said decree to apportion said encumbrances specified in their report or any of them.

12. The said commissioners had no authority under law or said decree to find or report that interest had or had not been paid on the said encumbrances or any of them or from what source the said interest had been paid.

13. The said report of said commissioners is indefinite and void as to the subject of incumbrances and interest.

14. That the court erred in confirming said report of commissioners in partition.

15. The court erred in rendering any decree of confirmation without preserving in the records the evidence upon which such decree was based.

16. The court erred in overruling the exceptions filed to the said report of commissioners.

908 17. The court erred in making any decree of partition on allotment of the incumbrances specified in such decree, when the cross-bill of the said Mary K. & Simon B. Buckner had no allegation concerning such encumbrances, and had no prayer for the allotment of such incumbrances.

18. The court erred in rendering any decree as to the said insurance moneies, as set forth in the latter clause of said decree of Jan., 1872.

19. The court erred in ordering a receiver appointed in another cause to make any report in this cause.

20. The court erred in decreeing that the receiver in another cause should pay over money to Mary K. Buckner.

21. The court erred in decreeing payment of the insurance moneys in the hands of said receiver without reference to the payments by him made.

22. The court erred in decreeing costs against the said infant, Henry W. Kingsbury.

For which errors the said Henry W. Kingsbury, by Anson
909 Sperry, his guardian *ad litem*, prays that the said decree may be in all things reversed and the cause remanded.

HENRY W. CRAWFORD,
EDWARD S. ISHAM,
Solicitors for Appellant.

Sept. 11, 1872.

STATE OF ILLINOIS, *ss:*

I, Cairo D. Trimble, clerk of the supreme court for the northern grand division of the State of Illinois, do hereby certify the above

and foregoing to be a true copy of a certified transcript of assignment of errors in a certain cause entitled in this court Henry W. Kingsbury *versus* Ambrose E. Burnside *et al.*, which transcript aforesaid was filed in this office on the 11th day of September, A. D. 1872, from the circuit court of Cook county.

Witness my hand and the seal of said supreme court, at Ottawa, in said State, this 24th day of October, A. D. 1873.

[*Clerk.*] C. D. TRIMBLE, *Clerk.*

(Endorsed:) Filed May 18, 1878. Wm. H. Bradley, clerk.

910 "EXHIBIT D."

In the Supreme Court of Illinois, Central Grand Division. January Term, A. D. 1873.

MARY K. BUCKNER and SIMON B. BUCKNER *vs.* HENRY W. KINGSBURY *et al.* } Appeal from Circuit Court of Cook County.

Brief for Appellee by Edward S. Isham and Henry Crawford.

911 In the Supreme Court of Illinois, Central Grand Division. January Term, A. D. 1873.

MARY K. BUCKNER and SIMON B. BUCKNER *vs.* HENRY W. KINGSBURY *et al.* } Appeal from Circuit Court of Cook County.

May it please the court—

A motion is made on the part of the infant appellee in the above cause, by his guardian, to set aside and annul the judgment of this court, to recall the mandate issued to the circuit court, and to dismiss the pretended appeal or to take such other action as the premises may require.

The motion is based upon the ground that the appeal was docketed in this court upon a forged record; that the record was changed by important additions to the cross-bill after issue had been joined upon it and probably after the date of the final order below dismissing it. It rests also upon an entire want of jurisdiction in this court and upon evidences of fraud appearing in the record and the affidavits filed with the motion.

In evidence of this fraudulent alteration of the record we have filed a copy of the cross-bill saved from the fire, which was made from the cross-bill after it was filed and as late as the filing of the infant's answer to it. This copy is verified by the affidavit
912 of the gentleman who made it, and who then in the office of the then guardian *ad litem* himself drew the infant's answer which appears in the record to this cross-bill.

This copy and affidavit show that the paragraphs containing the material averments upon which the cause was determined were

forged upon this record after the issues were joined, and the record itself shows that the interpolation was in fact made probably after the final hearing and dismissal of the bill below, for the letter and testimony which these paragraphs were intended to shelter were unknown to counsel until the opening of the deposition of Jane C. Kingsbury, taken December 20, at Old Lyme [Lynn], Conn., and the final order is shown by the record to have been made on the 24th December, though it was in fact made later.

Upon the filing of this forged record rests the whole jurisdiction of this court. The record imports verity. When filed in this appelate court it is with the assertion that it is true and fairly presents the issues upon which the cause of the infant was determined below. This record was false. It tendered an issue which did not exist and was never tried in the court below, and upon that new issue this court was induced to decide the cause. There was no testimony taken under this issue below for the infant, nor any opportunity given to investigate the circumstances of this letter or the conversation of ten years ago adroitly tacked to it, nor how it happened that all this matter was unknown to the witness when she filed her bill for dower, in October, 1868, against the boy alone, without the Buckners, as this record shows, and recovered upon her averments and proof that the boy was the sole owner of the estate. Upon this fraudulent and rotten support, therefore, depended the appeal in this cause.

We ask now attention to other matters in the history of this cause appearing in the record, but adroitly concealed by the abstract filed with the appeal.

The original bill was filed on July 19, 1870. It is a fact worthy to be noted and considered in connection with the other
913 features of this record that no attempt was made to bring the defendants before the court, either by process or by publication, and the bill rested on the files of the court without any action till October 31, 1870, when Buckner and his wife answered and filed this cross-bill. Soon after Jane C. Kingsbury and Burnside and John J. D. Kingsbury answered, all without process or rule. The cross-bill did not pray the establishment of the will, under which only the Buckners had claimed up to that time, but asserted the trust which has been engrafted upon the deed of May 15, 1861, and counted in evidence upon the will as a writing and upon no other writing. No process or publication was made on this so-called cross-bill, though it was against an infant and tendered a new issue; but on November 25, on motion of the Buckners, a guardian *ad litem* was appointed for Henry W. Kingsbury, and on Dec. 2 his answer to this cross-bill was filed. By the 24th of December, with wonderful celerity, the record shows that all the depositions were taken at Louisville, Old Lyme [Lynn], Conn., New York, and Chicago, and on that day, the very day on which the replications to the original bill were filed, the final hearing and order were reached.

Examination of the record will disclose that not a single witness was examined nor a deposition taken on behalf of the infant.

The guardian *ad litem* was appointed on Nov. 25, 1870. On No-

vember 22, three days before his appointment, Buckner and wife as cross-complainants served notice on him that a commission would issue on the 30th to take the deposition of Buckner, to be read in behalf of himself and his wife. A notice of but eight days when the statute requires ten is void. Nevertheless service was accepted three days in advance of appointment of any guardian *ad litem* and the statutory notice was waived.

But the record itself shows that no commission was sued out on this notice. Buckner's testimony was taken *ex parte* and read in evidence on the pretended authority of a commission signed, sealed, and tested on the 29th of November, of which no notice was ever given and to which no cross-interrogatories were filed.

914 Notice was served Dec. 5 that a commission would be issued on the 14th to take the testimony of Wm. F. Barrett. Service was accepted of this notice and its illegality waived by the guardian *ad litem*. But so far as is shown by the record nothing was done under it and the evidence of Barrett appears in the record without the protection or warrant of any commission whatever.

We insist now that Simon B. Buckner and Jane C. Kingsbury were incompetent to testify against their infant adversary on this record. Their testimony was illegal, forbidden by statute and public policy, ought not to have been admitted, and should be wholly disregarded. An infant cannot be concluded upon such a false and illegal record.

Lloyd *v.* Malone, 23 Ill., 44.
Fisher *v.* Fisher, 54 Ill., 231.
Kuchenbeiser *v.* Beckert, 41 Ill., 177.
Hess *et al. v.* Voss *et al.*, 52 Ill., 478.

This case was determined on the testimony of Simon B. Buckner himself and of Jane C. Kingsbury. Buckner and his wife are parties to the record adverse to the infant heir, and he testifies in her behalf as well as his own to divest the title of the heir. This is forbidden by law.

Moreover, all the material testimony of both Buckner and Jane C. Kingsbury consists ot their alleged conversations with Col. Kingsbury, who was dead when the testimony was given; and these conversations are given in a suit to divest his heir of his title. Such testimony is absolutely prohibited by statute. A claim based upon such testimony was indignantly thrust from this court in Fisher *v.* Fisher, and it is equally intolerable in this case. It is rejected by all civilized law.

Fisher *v.* Fisher, 54 Ill., 231.
Reeves *v.* Herr, 4 Chi. Leg. News, 5.

915 The replications to the answers of the Buckners were filed on December 24th. Under the statute (Gross, p. 73, § 34) the cause did not stand for hearing in the lower court until the next term sitting, in January. Inasmuch as the amount involved was unusually large and the principal defendant an infant, it might reasonably be expected that after the closing of issues there should

be at least the statutory pause before they rushed to judgment; but the next term of this court was close at hand, and on December 31, precisely two months from the filing of the cross-bill, the record, in a cause involving nearly a million of dollars, was closed by hearing and decree, and in the whole record there cannot be found one morsel of evidence, oral or written, which was introduced in behalf of the infant touching the vital question of the litigation.

Such was the record upon which both the original and the cross-bill were dismissed below, and this was the record proposed to be brought to this court. We ask the court now to consider the proceedings by which this manœuvre was performed.

The order dismissing both bills was wholly in favor of the infant, because it disposed of the cross-bill which was adverse to him, and no earthly benefit could be derived by him from the original bill; for even if the will had been formal and otherwise operative the statute, as to a posthumous and only child, gave him the whole estate. There was nothing to be gained by him, therefore, by any appeal whatever.

But it was by no means contemplated that the matter should halt here. The elaborate invention of this amiable trust, which was never asserted until Buckner's present counsel was called on to support the devise under the will, and the nicely fitting testimony of Buckner, which even this record unexpectedly proves untrue, were not invented to be rested upon the comparatively precarious decree of some inferior court, but were designed to be confirmed while the opportunity equally offered, by procuring, in some fashion, the judgment of the highest appellate court, and that, too, speedily.

916 In the first place, therefore, about this time, if not later, the record itself was tampered with, and the important paragraphs above referred to forged upon it for use in this court.

But this was not all. The final order dismissing the bills was actually made on the 31st of December, as stated by Buckner's counsel (Brief, p. 34). But this was by statute too late to file the record for the term of the supreme court in this central division, for that began in four days thereafter. The final decree was antedated, therefore, as of the 24th of the same month. This is not a a *nunc pro tunc* entry. There is no pretense that anything was actually done so early as the 24th; that there was any submission, hearing, or decree, because Woodbridge's deposition was not taken till the 28th, and yet it was used on the hearing. It was an unmitigated falsification of the truth of the record for supporting an appeal to the hurt of the infant. By this means the record would show that the final order was made ten days before the sitting of this court at its January term, in the central grand division. Was this required by the interests of the infant?

At that term and in that grand division, however, this court would have no jurisdiction of the subject-matter of an appeal from the circuit court of Cook county. By the regular course of law the cause would have been heard on appeal in the supreme court, for

the northern division, sitting in September. In the central grand division "no jurisdiction" is given to entertain the appeal.

People *v.* Stein, 40 Ill., 125.
Simpson *v.* Alexander, 5 Gilm., 261.
Owens *v.* McKethe, *ib.*, 79.
Goforth *v.* Adams, 11 Ill., 54.

It is in these cases held that the appellate court has no jurisdiction of a cause except in the grand division where the cause arises; but an entry was inserted in the final order that the parties in open court agree that the appeal shall be prosecuted to the next term of the supreme court, in the central grand division. Certainly an infant of eight years had no capacity by stipulation, nor had any
917 person for him, to give jurisdiction either of person or subject-matter to a court which otherwise had none, and he was not in "open court" consenting.

Rhoads *v.* Rhoads, 43 Ill., 239.
Enos *v.* Copps, 12 Ill., 255.
Kingsbury *v.* Kingsbury, 3 Chi. Leg. News, 330.
Bank of U. S. *v.* Ritchie, 8 P., 46.
Fisher *v.* Fisher, 54 Ill., 231; 1 Dan. Ch. Pr. 97.

We insist, therefore, that it indisputably appears that the cause of this infant was never before this court upon this forged record, with its falsified dates and its stipulated jurisdiction.

But jurisdiction equally failed in the appellate court because no appeal bond was filed, and such bond is made by statute a condition of the appeal. The law explicitly declares that an appeal without bond cannot be sustained, but this condition was again put aside by stipulation. The record contains the following:

"And thereupon the claimants in the cross-bill prayed an appeal to the supreme court, and the bond being waived by the other parties such appeal is allowed."

The appeal bond in such case could not be waived. The statute made the bond a condition precedent to the appeal, and without the bond the court is without jurisdiction. In its absence the court has no jurisdiction of the subject-matter, and no consent can give that jurisdiction even over adult parties, and *a fortiori* is it impossible over an infant.

Simpson *v.* Alexander, 5 Gilm., 260.
Bradley *v.* Sneath, 6 Ohio, 495.
United States *v.* Curry, 6 How., 113.
The Lucy, 8 Wall., 307.
Mills *v.* Brown, 16 P., 525.
Sampson *v.* Welsh, 24 How., 207.
Carson *v.* Merle, 3 Scam., 168.
Henderson *v.* Fitch, 19 Ills., 404.

918 There is no original jurisdiction in this court except in certain special cases. The jurisdiction arises by appeal or on error. When, therefore, a cause is brought here by appeal all the

preliminary steps required by law, such as the praying the appeal, at the time of rendering the judgment, and the appeal bond, are analogous to the process by which the court below acquired its jurisdiction, and certainly the service of process below could not have been waived and jurisdiction of an infant given by consent or appearance. If this cause had been brought here on error instead of appeal the issue and service of the writ of error upon an infant could not have been waived.

In Washington County *v.* Durant a cause had been brought from the circuit court "as on a writ of error by agreement of parties and without the issuing or service of such a writ." "The appeal was dismissed, the chief justice stating it to be the opinion of the court that an appeal allowed or writ of error served was essential to the exercise of its appellate jurisdiction."

Washington County *v.* Durant, 7 Wall., 694.
Kingsbury *v.* Kingsbury, 3 Chi. Leg. News, 330.
The Lucy, 8 Wall., 309.

The appellate jurisdiction of this court can be exercised only under the requirements and conditions of law. Lower courts have no power to fix terms of appeal; this is done by statute. The bond is required not merely for the benefit of the private litigant; it covers costs. The public is interested in it, and neither the parties nor the court below can set it aside; if they do it there is no jurisdiction on the appeal.

All the proceedings for bringing the cause to this court were, of course, had after the final order dismissing both the original and the cross-bills, and it may be seen that every subsequent step in the prosecution of this appeal was founded upon the stipulation of the guardian *ad litem*, but the powers of the guardian *ad litem* ended with the end of the cause in which he was appointed.

When by the final decree and dismissal of the cross-bill the
919 *lis* in which he was appointed ended, then *ex vi termini* the guardian *ad litem* became *functus officio*; and when the circuit court had enrolled a decree in favor of his word dismissing a cross-bill can it be pretended that a guardian *ad litem*, appointed for the sole purpose of procuring that decree, can in the next breath vacate and annul by his private stipulation with the infant's adversary this very decree of the court which appointed him to obtain it? For an appeal, unlike a writ of error, vacates the judgment or decree below. Bradley *v.* Sneath, 6 Ohio, R. 495. The functions of the guardian ended with the dismissal of the cross-bill until by some process of law the decree below was vacated and the cause and the parties removed to the appellate court.

This, then, was the simulated record, and this the procedure by which it was pretended to have been brought before this court on appeal. We venture to say that so ugly a record has never been seen in a court of justice. We now call attention to one further evidence of the bad faith and the duplicity with which this cause has been conducted against this infant. The theory of the cause prosecuted by Gen. Buckner and his counsel is solely this—that the deed

of conveyance from Buckner and his wife to Col. Kingsbury of May 15, 1861, upon which the trust has been engrafted, was made by him for the sole purpose of devesting himself of all interest in the estate, which had descended to her from her father, and that he had intended this for years; and he asks the court to carry out that purpose for him and make such a decree as shall vest the estate in her discharged of all his interest therein. His statement is contained in his answer to the 35th interrogatory.

That this theory is wholly untrue is shown by the statement of Mr. Barrett, whose deposition is also in this record. He was the attorney of Gen. Buckner at Louisville and drew the deed and attended at its execution. He states the circumstances of the
920 execution: "Buckner was absent from Louisville, when his wife informed me that she was determined to execute the deed, and I, at her request, telegraphed him to return home, which he did. He was then at Frankfort, Ky. I advised her not to sign the deed at that time. She insisted on doing so, and hence I telegraphed Buckner and thus procured his presence." (Int. 9.) In reply to the 3d cross-interrogatory he said that Buckner "left to return to Frankfort again before the notary had completed the certificate."

It is not true, therefore, that Buckner urged the execution of this deed upon his wife, reluctant to accept it. It is not true that he was too high spirited, as he represents himself, to bear the consciousness of any interest in his wife's estate. It was Mrs. Buckner, and not he, who "insisted on" the execution of this deed. She overruled his purpose and the advice of his attorney and had him brought by telegram from Frankfort for its execution, when he came in such haste that he left to return before the notary had completed the certificate. But the court was persuaded solely by Buckner's testimony to act upon his pretended purpose, and by the mandate, which we now ask may be recalled and cancelled, considerately directed the decree to be so entered below as to vest the estate in Mrs. Buckner discharged of all interest in her husband; and such a decree was carefully entered.

And now we have the sequel. A fitting commentary upon the dignified sensibility which Buckner has paraded before the court is presented in the deeds of conveyance to Buckner himself of the entire estate, so carefully vested in Mrs. Buckner by the decree which he asked the court to render. The certified copies of the deeds are attached to the affidavits filed with this motion. They both were made on the 28th of February, 1872; and one is an absolute deed from Mrs. Buckner and her husband to one Woolley, and the other is a deed from Woolley and his wife to Simon B. Buckner and his heirs. A power of appointment by deed or will pretends to be conferred upon Mrs. Buckner by the deed from Woolley. It is evident that this power is a nullity
921 and a sham, for it is repugnant to the grant of the estate, and Woolley, obviously a naked trustee, appears to have had no power to impose this limitation upon the fee-simple estate he had already granted to Buckner. But the deed concludes: "But it is

hereby declared, and such is the intent of each and all the parties hereto, that the sole grant and conveyance of said property to said party of the second part is for his own proper use and benefit, free from the use and benefit of all others whomsoever, and to be disturbed only, if at all, by the discretionary exercise of the power to limit, direct, convey, or appoint by her, the said Mary K. Buckner, in the modes above described, to hold to him, the said Simon B. Buckner, of the second part, and his heirs forever."

That the pretended purpose of the deed to Col. Kingsbury was a graceless fiction invented to impose upon the court and furnish a plausible theory for an imaginary trust and to be abandoned the moment the end was accomplished; that the whole cause, in all its history from the filing of the cross-bill to the execution of the deed from Wooley to Buckner, has been an attempted trick upon the court to reach that result, and a thorough fraud we need waste no words to argue. Almost before the ink was dry in the decree which Buckner solicited for his wife so demurely, as soon, indeed, as he conceived the action of this court had given him the infant's estate, and that the property was securely in his grip, with even indecent haste, he dropped his mask and clothed himself with a larger estate than that which had so burdened his delicacy before. So much of duplicity and deceit as is shown above is certain. How much more exists among the secrets of this record we have at present, perhaps, no means to show. But every presumption is to be indulged against the parties who made this record. "*Omnia præsumuntur contra spoliatorem.*" The positions of Buckner have been insincere from the inception of the cause. They were false when he said the conveyance to Col. Kingsbury was without consideration, for an ample one can be shown; false when he alleged he was not then in
922 debt to the estate; and false when he gave his fictitious reasons for the conveyance. He procured the decree of this court not only on a forged record, but by the use of his oath as to matters which these deeds show to have been false and fraudulent. We believe such a record was never yet allowed to stand when its true character was disclosed to the court, and we urge, therefore, the motion of the guardian.

We ask the court to annul the judgment entered upon this fraudulent and forged record, to recall the mandate sent to the court below, and to dismiss the pretended appeal. This is the proceeding by which, in cases far less obnoxious than this, other courts have vindicated their immunity from duplicity and deception.

In *ex parte* Crenshaw a judgment of reversal had been given against Crenshaw upon the argument of appellants under the belief that he had been regularly cited. Taney, C. J., said: "A motion has been made at the present term on behalf of Crenshaw to set aside and annul the judgment and decree of this court, and also to dismiss the appeal.

"As there is no case now pending here between these parties there is nothing upon which an order to dismiss would operate. But upon the facts above stated it is very clear that the case was not legally before us at the last term; and the decree then pronounced

must, therefore, be declared null and void, and the mandate directed to the circuit court must be revoked. An order will accordingly be issued from this court."

Ex parte Crenshaw, 15 Peters, 119.

In that case it was disclosed to the court that at the previous term by misapprehension it had not acquired jurisdiction of the person of the appellee against whom its judgment of reversal was given; and it declared null the judgment and recalled the mandate.

In United States *v.* Gomez a cause had been docketed and dismissed in the supreme court, and a mandate thereupon sent down on
923 the motion of the appellee. Afterwards it appeared that the pretended appeal had been illegally and fraudulently procured, and the court vacated the order of dismissal and recalled the mandate.

In deciding the motion Wayne, justice, said:

"The case is also before us upon a motion (for a mandamus), but we do not consider it, upon the ground that this court had no jurisdiction of the case when it was docketed and dismissed, and that the appellee had no right to make that motion under the rule of this court. All that we shall now do will be to correct an irregularity in the order given by this court in a case which we believe it had no jurisdiction, and because the circumstances of it disclose that the judgment in the court below had been obtained by contrivance and with the consent of the district attorney, in violation of his obligations to the United States, from which he necessarily anticipated a benefit, being then owner of half the land in controversy.

"In vacating the order for the dismission of the case and for recalling the mandate we do no more than to correct a proceeding improvidently allowed by the court under a misrepresentation to it of the actual condition of the cause in the court below. Orders of the same kind for misrepresentation have often been made and allowed. We cite two cases from the English Reports. In Stewart and E. Drew, petitioners, and J. P. Agnew, in Shaw's Reports, it was held to be incompetent to repeal a case on the merits formerly argued and on which judgment had been pronounced by the House of Lords, but that the judgment might be amended on a point in which no decision had been given by the court of session and on which no argument had been had through misrepresentation stated in the House of Lords by the party against whom the judgment was pronounced. 1 Shaw, 413.

"In *ex parte* James White, Courtnay, *et al.*, 4 House of Lords Cases, 313, it was ruled upon petition that a judgment of the house given on appeal cannot be reversed; but when such appeal and judgment have been obtained by suppression and misrepre-
924 sentation, the house will afterwards discharge the order granting leave to appeal and the order constituting the judgment thereon. * * *

"We direct that the order for docketing and dismissing this cause shall be vacated and that the mandate which followed it shall be recalled."

United States *v.* Gomez, 23 How., 326.

In Stewart and Agnew, 1 Shaw's Appeal Cas., 413, Lord Eldon stated the exceptions to the rule of finality of an order to the House of Lords. They are, 1st, clerical error; 2d, surprise on either party so that he has not had fair opportunity of answering; 3d, when a fraud has been practised on the court itself and its judgment thereby obtained. As to these matters his lordship says that a judgment so obtained is an absolute nullity.

1 Shaw's App. Cas., 313.

In White *v.* Tommey, 4 House of Lords Cases, 313, the application was to the House of Lords for a rehearing on the reason that they had at the instance of Tommey reversed a decree upon grounds previously adjudicated upon in the house, and had been induced to do so by his misstatement that "the said decree had never been adjudicated upon by their lordships." The misstatement of Tommey, on which the application rested, was that it appeared by order of the house that the decree of 1835 was not complained of. He did not say it was not complained of. Lord Cranworth said: "That is a complete misrepresentation. It was argued that all that is said is that it appears by the order that the decree of 1835 was not complained of. Now, that, I think, is fencing or quibbling in a way that your lordships will never permit to any suitor at your bar. If you come to scan the matter in the closest way it is a misrepresentation. It is not correct to say that it appears by the order that the decree was not complained of; perhaps, speaking by the card, it might not have been an untruth to say that it does not appear by the order that it was complained of." * * *

925 "Now comes the important question, What ought your lordships to do in this state of things?* (P. 332.) Although in any question decided by this house upon appeal the matter is finally settled between the litigant parties, it is always subject to this condition, that if one party has by any misrepresentation—I will not put it so high as to say fraud, for I do not wish to use harsh terms—but it by misrepresentation, inadvertently (if you will) introduced, a party has led the house into an error—has led it to suppose that something is going on irregularly—all the commonest principles of justice compel this house, as they must compel any other tribunal, to interfere to prevent its own decisions from being made the machinery for effecting a fraud or the machinery for effecting that which, if not done *per incuriam*, would have been fraud. * Now, what is the course your lordships ought to take? I think the precise relief which is asked by these gentlemen is quite erroneous. They ask that the case may be reheard. That is not what I recommend your lordships to do at all; but, though they ask that, they ask also in a general way what is sufficient for a case of this sort, 'that your lordships would grant to the petitioners such relief as to your lordships in your great wisdom shall seem meet.' What is the relief, then, which your lordships in your wisdom ought to think fit to grant to these parties? Evidently to put them in precisely the same position as that in which they were before that erroneous order was made (behind their backs) giving leave to Tom-

mey to present the appeal which has led to all the difficulty. That is the relief which I shall propose to your lordships to grant;" and upon the reason of this misrepresentation the house discharged the order granting leave to appeal and the order constituting the judgment thereon.

What may we suppose Lord Cranworth and Lord Brougham and Lord Truro would have thought of this record which we now present to this court?

If all these objections had been urged in this court before, would the court have sent down this mandate? Certainly not, and that because of the actual fraud and the fraud in law upon the
926 infant ward of the court. If these considerations would have availed then, they ought to have been urged. It was fraud in the infant's adversary to bring such a record here, for *uberrima fides* is demanded of him. It was a failure in duty that they were not brought to the notice of the court by its officer, the guardian *ad litem*, for he was appointed to defend the infant. It was by an adroit abstract of the record and inadvertence that they escaped the notice of the court, or it would of its own motion have vindicated the right of its infant ward to a truthful record and legal evidence. If by inadvertence or in any way these objections failed to come to the notice of the court, then these are in law the wrongs of the court and of its own officer, and the court is doubly bound to rectify them.

This case presents no longer to the court a question of the construction of the statute of frauds. It is no longer an issue of evidence or the legal effect of a letter. It is now the question how far the court will protect its records and compel sincerity and integrity in the proceedings in its forum. It is a question whether honesty or dishonesty shall make use of its machinery of the law; of what atmosphere we are to breathe when we come into this hall, and whether sincerity and integrity or forgery, chicanery, and deceit shall control procedure in this forum and dominate the rights of litigants. It will be a proper time for us to discuss the statute of frauds when we have an honest and legal record to discuss it upon. This application is made at the first term of this court since the matters complained of came to our knowledge, and we ask that the judgment may be discharged and the mandate recalled.

EDWARD S. ISHAM,
HENRY CRAWFORD,
Solicitors for Appellee.

927 *Affidavit.*

STATE OF ILLINOIS, }
County of Cook, City of Chicago, } *ss:*

I, William H. Wherland, being duly sworn, depose and say that the foregoing instrument of writing is a true copy of the original cross-bill in the cross-cause of Mary K. Buckner *et al. vs.* Henry W. Kingsbury, in the circuit court of Cook county; that the said copy was made by me from the said original cross-bill and the said copy

is a correct and literal copy of the said cross-bill at the time the said copy was made. I was at the time I made the said copy in the employ of Messrs. Beckwith, Ayer and Kales, in their office, and made the copy at their direction, and it is the copy which was used in drawing the answer of Henry W. Kingsbury to the said cross-bill.

My attention has been called to the following two paragraphs, which are printed in a printed copy of the record or a portion therof, and containing what purports to be a copy of the cross-bill filed in said cause.

These paragraphs are as follows:

"And your orators further show that said will of the said Henry W. Kingsbury was made and executed in conformity to the laws of the State of Virginia, and on the 9th day of May, 1870, the same was proved before and admitted to probate by the corporation court of the city of Alexandria, in the State of Virginia, a court having jurisdiction under the laws of that State of the probate of wills, as the true last will and testament of the said Henry W. Kingsbury, said court also having jurisdiction then and there to receive proof and admit to probate said will; and afterwards, to wit, on the
928 11th day of July, 1870, a copy of said will and probate thereof, duly certified according to the laws of the State of Illinois in such case made and provided, was presented to the circuit court of Cook county, in the State of Illinois, and by said court then and there ordered to be recorded, and to be good and available in law in like manner as wills made and executed in this State, and the same was recorded in accordance with said order.

"And your orators further show that the said Henry W. Kingsbury, on the 23d day of October, 1861, wrote with his own hand a letter to his mother, Jane C. Kingsbury, and signed the same by his signature 'Henry,' in which, among other things, he wrote: 'I spent all the morning with Burnside yesterday. He stated, as I told you, that Simon had made over all the Chicago property that was held in his name to me. A new power of attorney is therefore necessary from you and myself. We made one out; I signed it. Burnside will send it to you.' And they aver that the reference in said letter by the words 'as I told you,' was to a conversation between the said Henry W. Kingsbury and his mother, had in their last personal interview, before the date of said letter, in which the said Henry W. Kingsbury expressly admitted that he held all the property of your orator, Mary K. Buckner, inherited from her father, in trust for a short time, and said that he would restore it all to her whenever she desired."

These two paragraphs were not in the said original cross-bill at the time I made the foregoing copy thereof nor when the answer of Henry W. Kingsbury to the said cross-bill was filed. They are inserted in the middle of a sentence, near the close of a paragraph in the original cross-bill, where the sentence was broken by a semicolon, and the remainder of the sentence succeeding the said semicolon is made a separate paragraph at the end of the two paragraphs

which were interpolated. I drew myself the answer of the infant Henry W. Kingsbury to the cross-bill, and the allegations
929 contained in the two printed paragraphs foregoing were not contained in the original cross-bill, but have since been introduced into the same. This copy was made after the filing of the original cross-bill and about the time of filing the answer of Henry Kingsbury to the said cross-bill.

[NOTARIAL SEAL.] (Signed) W. H. WHERLAND.

Subscribed and sworn to before me this 30th day of December, A. D. 1872.

SAMUEL W. SMITH,
Notary Public.

930 KINGSBURY *v.* BUCKNER.—EXHIBIT E.

UNITED STATES OF AMERICA.

STATE OF ILLINOIS, } ss:
Cook County, }

Pleas before the honorable the judges of the circuit court of Cook county, at a term thereof begun and held at Chicago, in said county and State, on the third Monday (being the sixteenth day) of June, in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the United States the ninety-seventh.

Present: Hon. E. S. Williams, chief justice of the circuit court of Cook county, State of Illinois; W. W. Farwell, Henry Booth, John G. Rodgers, Lambert Tree, judges; Charles H. Reed, State's
931 attorney; Timothy M. Bradley, sheriff.

Attest: JACOB GROSS, *Clerk.*

Be it remembered that at the term aforesaid, to wit, on the 18th day of June, A. D. 1873, the following, among other, proceedings were had and entered of record in said court, to wit:

MARY K. BUCKNER — SIMON B. BUCKNER
v.
HENRY W. KINGSBURY, by etc. } 88, 29.

This day come the defendant, by his solicitor, and, on motion, it was ordered that said defendant have leave to file the mandate of the supreme court remanding said cause.

STATE OF ILLINOIS, } ss:
Cook County, }

I, Jacob Gross, clerk of the circuit court of Cook county and the keeper of the records and files thereof in the State aforesaid, do hereby certify the above and foregoing to be true, perfect, and com-

plete copy of a certain order made & entered of record on the 18th day of June, A. D. 1878, in a certain cause pending in said
932 court, on the chancery side thereof, between Mary K. Buckner *et al.*, complainants, and Henry W. Kingsbury, by etc., defendant.

In witness whereof I have hereunto set my hand and
[SEAL.] affixed the seal of said court, at Chicago, in said county, this eighth day of May, A. D. 1878.

JACOB GROSS, *Clerk.*

(Endorsed:) Filed May 18, 1878. Wm. H. Bradley, cl'k.

933 EXHIBIT F.—KINGSBURY *v.* BUCKNER.

UNITED STATES AMERICA.

STATE OF ILLINOIS, } *ss:*
Cook County, }

Pleas before the Honorable E. S. Williams, one of the judges of the circuit court of Cook county, at a term thereof begun and held at Chicago, in said county and State, on the third Monday (being the nineteenth day) of February, in the year of our Lord one thousand eight hundred and twenty-seven, and of the Independence of the United States the one hundred & first.

Present: Honorable E. S. Williams, one of the judges of the circuit court of Cook county, State of Illinois; L. L. Mills, State's attorney; Charles Kern, sheriff.
Attest: JACOB GROSS, *Clerk.*

934 Be it remembered that at the term aforesaid, to wit, on the 7th day of March, A. D. 1877, the following, among other, proceedings were had and entered in said court, to wit:

HENRY W. KINGSBURY, by &c., &c., } 881. Bill.
vs.
AMBROSE E. BURNSIDE *et al.* }

and

MARY K. BUCKNER & SIMON B. BUCKNER } Cross-Bill.
vs.
HENRY W. KINGSBURY *et al.* }

This day came Messrs. Goudy, Chandler & Skinner and suggested the death of Mary K. Buckner, one of the complainants in the cross-bill of complaint herein.

And, on motion, it is further ordered that Lilly Buckner be, and she hereby is, substituted as party complainant in said cross-bill in place of said deceased.

HENRY W. KINGSBURY, by His Next Friend,
vs.
AMBROSE E. BURNSIDE *et al.* } Bill.

935 LILLY BUCKNER *et al.*
vs.
HENRY W. KINGSBURY *et al.* } Cross-Bill.

This cause coming on to be heard upon the exceptions filed by Henry W. Kingsbury, by his guardian, on the 25th day of January, 1872, to a part of the report of the commissioners heretofore appointed to make partition, and to the report of John Woodbridge, master in chancery, filed January 23d, 1872, so far as stated in said exceptions, and upon the proofs taken thereupon and in obedience to the mandate and directions of the supreme court, it is ordered, adjudged, and decreed that the exceptions filed on the 25th day of January, 1872, by the said Henry W. Kingsbury, by his guardian, to that part of the report of the commissioners appointed to make partition which divides in two equal parts the following tract of land, to wit, those certain premises situate in Chicago, county of Cook and State of Illinois, described as follows, to wit: "Commencing at the north side of Kinzie street at the center of the North Branch of the Chicago river, running thence north along the center of said North Branch to a point one hundred and fifty (150) feet distant from the place of beginning; thence
936 east to the center of Payton street (sometimes called East Water); thence along the center of Payton street to the north line of Kinzie street, and thence west along the north line of Kinzie street to the center of said North Branch, the place of beginning, and allots one-half to Mary K. Buckner; and to the report of John Woodbridge, master in chancery, filed January 23rd, 1872, so far as stated in said exceptions, be, and they are hereby, sustained, and that the deed executed by said master in chancery to said Mary K. Buckner be, and hereby is, annulled in so far as it purports to convey an undivided half of said above-described premises.

And it is further ordered that said Woodbridge, as master in chancery, execute and deliver a deed conveying all the above-described real estate, otherwise called the "Spencer tract," to said Henry W. Kingsbury in fee simple, subject to the incumbrances.

It is further ordered that the matter of stating and [an] account between the parties to the cross-bill be reserved for the future consideration of the court.

937 And it is further ordered that the cross-complainants pay the costs accruing upon said exceptions to this court.

STATE OF ILLINOIS, } *ss:*
Cook County, }

I, Jacob Gross, clerk of the circuit court of Cook county and the keeper of the records and files thereof, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect, and complete copy of certain orders made and entered of record on the 7th day of

March *13th*, 1877, in a certain cause pending in said court, on the chancery side thereof, between Henry W. Kingsbury, by, &c., complainant, and Ambrose E. Burnside *et al.*, defendants.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Chicago, in said county, this eighth day of May, A. D. 1878.

[SEAL.] JACOB GROSS, *Clerk.*

(Endorsed :) Filed May 18, 1878. Wm. H. Bradley, cl'k.

938 KINGSBURY *vs.* BUCKNER.—EXHIBIT G.

STATE OF ILLINOIS, } *ss:*
Supreme Court, Central Grand Division, }

At a supreme court begun and held for the central grand division of the State of Illinois, at Springfield, to wit, on the 7th day of January, A. D. 1873, to wit, on the 25th day of February, A. D. 1873.

Present: Charles B. Lawrence, chief justice; Pinkney H. Walker, justice; John M. Scott, justice; Anthony Thornton, justice; Sidney Breese, justice; Wm. R. McAllister, justice; Benjamin R. Sheldon, justice.

Be it remembered that on the 20th day of January, A. D. 1873, being one of the regular days of said January term, 1873, an
939 order was made by the court in the cause and in the words & figures following, to wit:

SIMON B. BUCKNER *et al.*
v.
HENRY W. KINGSBURY. } Appeal from Cook — on Motion.

Henry W. Kingsbury, one of the defendants in the above-entitled cause, by Anson Sperry, his guardian, comes now and moves the court to set aside and annul the judgment heretofore rendered in this cause at the January term thereof of 1872, and to recall the mandate and to dismiss the appeal because the said appeal and judgment & mandate have been fraudulently procured from this court upon a forged and fraudulent record, and for the reason that the said appeal, judgment, and mandate have been procured by fraudulent practice and a deceit practiced upon the court and without jurisdiction of the subject-matter or of the parties to the said pretended appeal.

And he refers to and makes a part of this motion the copy of the original cross-bill filed in the court below, and the affidavit of William H. Wherland attached thereto, and the other affidavit filed herewith, and the exhibits thereto.

940 And he prays for such other and further relief as the petitioner may be entitled to in the premises; and your petitioner respectfully shows that all the matters aforesaid have come to his knowledge since the close of the January term, 1872, of this

court, and that the copy of the cross-bill filed herewith has come to his knowledge since the first day of December, A. D. 1872.

ANSON SPERRY,
Guardian of the Estate of Henry W. Kingsbury.

And the court not being sufficiently advised of and concerning the premises herein, it is ordered by the court that this motion be taken under advisement of the court.

And be it further remembered that on this day, being the 13th day of February, A. D. 1873, being one of the regular days of said January term, A. D. 1873, an order was made in the cause and in the words and figures following, to wit:

SIMON B. BUCKNER *et al.*
v.
HENRY W. KINGSBURY. } Appeal from Cook — on Motion.

And on this day comes said parties, and the court being sufficiently advised of and concerning the premises herein, it is
941 ordered that the motion to set aside a former judgment made herein be, and the same is hereby, overruled.

I, E. C. Hamburgher, clerk of the supreme court of the central grand division of the State of Illinois, do hereby certify the foregoing to be a true copy of the motion to vacate judgment and the order of the court upon said motion in said cause as the same appears from the records and files of my office.

In testimony whereof I hereunto set my hand and the seal of said court, at Springfield, this 8th day of May, 1878.

[SEAL.] E. C. HAMBURGHER, *C. S. C.*

(Endorsed:) Filed May 18, 1878. Wm. H. Bradley, cl'k.

942 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a true and correct transcript of the record of all the proceedings had in said court in the cause wherein Henry W. Kingsbury is the complainant and Simon B. Buckner, Jane C. Kingsbury, John J. D. Kingsbury, Corydon Beckwith, and Ambrose E. Burnside are defendants as the same appear from the files and records of said court now remaining in my custody and control.

Seal of Circuit Court U.S., Northern Dist. Illinois, 1855.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said district, this first day of October, 1886.

WM. H. BRADLEY, *Clerk.*

943 The United States of America to Simon B. Buckner, Jane C. Kingsbury, John J. D. Kingsbury, Corydon Beckwith, and Ambrose E. Burnside, Greeting:

You are hereby cited and admonished to be and appear at a Su-

preme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to an appeal prayed and allowed from the circuit court of the United States for the northern district of Illinois, wherein Henry W. Kingsbury is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant in the said court in the cause of Henry W. Kingsbury against you should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Walter Q. Gresham, judge of the circuit court of the United States for the northern district of Illinois, this ninth day of January, in the year of our Lord one thousand eight hundred and eighty-six.

WALTER Q. GRESHAM.

944 [Endorsed:] I have executed this writ by reading the same to and within the presence and hearing of and also by delivering a true copy thereof to Corydon Beckwith, therein named, on the 21st day of January, A. D. 1886. F. H. Marsh, U. S. marshal, by Geo. R. Jones, deputy.

Fees paid:

One service	2 00
" copy	50
" mile to serve	06
" return	10
	$2 66

Executed on S. B. Buckner by reading the same to him Feb'y 23rd, 1886. A. J. Gross, U. S. M. Marshal fees, $3.00.

On this — day of ——, in the year of our Lord one thousand eight hundred and eighty —, personally appeared —— —— before me, the subscriber, —— ——, and makes oath that he delivered a true copy of the within citation to —— ——.

—— ——.

Sworn to and subscribed the — ——, A. D. 188–.

—— ——.

945 The United States of America to J. Howard Manchester, administrator of the estate of Ambrose E. Burnside, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the 20th day of October next, pursuant to a petition for and allowance of an appeal filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, in a certain cause wherein Henry W. Kingsbury is appellant and Simon B. Buckner, Jane C. Kingsbury, John J. D. Kingsbury, Corydon Beckwith, and Ambrose E. Burnside are appellees, and also pursuant to the order

of the said Supreme Court of the United States made in said cause on the 8th day of November, 1886, a true copy of which is hereunto annexed, to show cause, if any there be, why the decree rendered against the said appellant, as in the said petition mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this eleventh day of November, in the year of our Lord one thousand eight hundred and eighty-six.

M. R. WAITE.

946 DISTRICT OF RHODE ISLAND, *sc:*

PROVIDENCE, *Nov.* 30, 1886.

I this day served this citation and the accompanying order on the — J. Howard Manchester, "administrator of the estate of Ambrose E. Burnside, deceased," within named, by personally reading each to him in his presence and hearing, and also by personally delivering to him, the said Manchester, a true and attested copy of each.

JAMES H. COGGESHALL,
U. S. Marshal for the District of Rhode Island.

Fees:

2 services	$4 00
Copies	1 00
Actual expenses of travel	1 50
	$6 50

On this thirtieth day of November, in the year of our Lord one thousand eight hundred and eighty-six, personally appeared James H. Coggeshall, U. S. marshal dist. of R. I., before me, the subscriber, a commissioner of the circuit court of the United States within and for the district of Rhode Island, and makes oath that he delivered a true copy of the within citation and of the accompanying order to the within-named J. Howard Manchester personally.

JAMES H. COGGESHALL,
United States Marshal for the District of Rhode Island.

Sworn to and subscribed the thirtieth day of November, A. D. 1886.

[Seal Henry Marsh, Jr., U. S. Commissioner, District of Rhode Island.]

HENRY MARSH, JR.,
U. S. Commissioner for the District of Rhode Island.

947 Supreme Court of the United States. October Term, 1886.

HENRY W. KINGSBURY, Appellant, *vs.* SIMON B. BUCKNER, JANE C. KINGSBURY, John J. D. Kingsbury, Corydon Beckwith, and Ambrose E. Burnside.	No. 1149. Appeal from the Circuit Court of the United States for the Northern District of Illinois.

Mr. Fillmore Beall, in behalf of counsel for the appellant, suggested the death of Ambrose E. Burnside, one of the appellees in this cause, after final decree herein in the circuit court of the United States for the northern district of Illinois and before the appeal herein was allowed, and moved the court for an order, under paragraph 3 of rule 15, of this court, that J. Howard Manchester, administrator of the estate of Ambrose E. Burnside, deceased, make himself a party to this cause. On consideration whereof it is now here ordered by the court that unless the said J. Howard Manchester, administrator of the estate of Ambrose E. Burnside, deceased, shall make himself a party to this cause within the first ten days of the ensuing term of this court the appellant shall be entitled to open the record and on hearing have the decree reversed if it be erroneous, provided, however, that a proper citation reciting the substance of this order shall be served upon the said J. Howard Manchester, either personally or by being left at his residence, at least sixty days before the beginning of the term of this court next ensuing.

November 8, 1886.

A true copy.

Test:

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk Supreme Court U. S.

948 [Endorsed:] Sup. Court U. S. 1886, Oct'r term. No. 1149. Henry W. Kingsbury, app't, *vs.* Simon B. Buckner & *al.* Citation to J. Howard Manchester, adm'r of Ambrose E. Burnside, with proof of service.

[Stamped:] Office Supreme Court U. S. Filed Dec. 4, 1888. James H. McKenney, clerk.

Endorsed on cover: N. Illinois C. C. U. S. No. 176. Henry W. Kingsbury, appellant, *vs.* Simon B. Buckner, Jane C. Kingsbury, John J. D. Kingsbury, Corydon Beckwith, and J. Howard Manchester, adm'r of Ambrose E. Burnside, deceased. Filed October 14, 1886.

ADDITIONAL TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1889.

No. 176.

HENRY W. KINGSBURY, APPELLANT,

vs.

SIMON B. BUCKNER, JANE C. KINGSBURY, JOHN J. D. KINGSBURY, CORYDON BECKWITH AND J. HOWARD MANCHESTER, ADMINISTRATOR OF AMBROSE E. BURNSIDE, DECEASED.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Kingsbury v. Buckner, Exhibit D.

SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION.

SEPTEMBER TERM, A. D. 1872.

Henry W. Kingsbury,
By Anson Sperry, Guardian ad litem,
vs.
Mary K. Buckner,
Simon B. Buckner *and*
Jane C. Kingsbury.

Appeal
From Circuit Court of
Cook County.

BRIEF FOR APPELLANT.

HENRY CRAWFORD,
Solicitor for Appellant.

Filed May 18, 1878.
W. H. BRADLEY, *Clk.*

SUPREME COURT OF ILLINOIS, NORTHERN GRAND DIVISION.

September Term, A. D. 1872.

Henry W. Kingsbury,
By Anson Sperry, Guardian ad litem,
vs.
Mary K. Buckner,
Simon B. Buckner *and*
Jane C. Kingsbury.

Appeal
From Circuit Court of
Cook County.

On July 19, 1870, Henry W. Kingsbury was an infant, aged about eight years, living in Rhode Island. On that day a bill was filed in the Circuit court of Cook county, in his name, by a next friend, against Ambrose E. Burnside, Mary K. Buckner, Simon B. Bucker, Jane C. Kingsbury, and others. It alleged that the complainant was the posthumous and only heir of Henry W. Kingsbury. deceased in 1862; that the parties defendant were claiming to be devisees and executors under a paper writing, purporting to be the last will of his father, and were undertaking to probate such paper as a valid testament in the County court of Cook county, when, in fact, the said pretended will was not attested so as to be a valid will under the laws of Illinois, and was of no validity as against the posthumous child of the pretended testator, for whom no provision was made therein. The only scope and prayer of the bill was that the instrument purporting to be the last will and testament of Henry W. Kingsbury, deceased, might be declared invalid, and the proceedings in probate in the County court, be set aside as a cloud on the complainant's title, to the property inherited from his father.

It is a fact worthy to be noted and considered in connection with the other remarkable features of this record, that no attempt was made to bring the defendants before the court, either by process or publication, and the bill rested on the files of the court, without any action whatever, until October 31, 1870, when Mary K. Buckner and Simon B. Buckner answered and filed a cross-bill; on November 22, 1870, Jane C. Kingsbury answered, and on December 6, 1870, Burnside and John J. D. Kingsbury filed their answer to the bill, and these appearances were without the compulsion of process or rule on the parties to answer the bill. The cross-bill of Buckner and wife did not pray the establishment of the will which they had been urging for probate, both in Virginia and Illinois, but tendered entirely new issues concerning the validity and effect of a recorded conveyance of May 15, 1861, from them to Henry W. Kingsbury. It inconsistently avers that the deed alluded to was never delivered, so as to be valid against either grantor; that it was without consideration; that the property conveyed was Mrs. Buckner's, and her acknowledgment was insufficient to pass her title; that the deed was voluntarily made, believing the grantee would permit the grantors

to receive the rents and profits, and convey or re-convey the premises as requested by the grantors, or either of them; that by reason of such facts, a resulting trust arose for the use of the grantors to the extent of their respective interests and titles to the property; that in fact the grantee held it on an express trust for Mrs. Buckner only, and that such trust was sufficiently evidenced by the so-called will, dated March 25, 1862, and a clause in a letter from Henry W. Kingsbury to his mother, dated October 23, 1861.

The prayer of this cross-bill was that the deed might be declared void as to Mary K. Buckner, that it might be declared a deed of trust for the grantors, or one of them, for a reconveyance, account, that dower may be assigned, partition made, and possession awarded.

No process or publication was made on this cross-bill.

On November 25, 1870, on motion of the Buckners, a guardian *ad litem* was appointed for Henry W. Kingsbury. No demurrer was filed, or suggestion made of want of jurisdiction over the non-resident infant, but on December 2, 1870, an answer to this cross-bill was filed in the name of the infant defendant.

December 24, 1870, replications were filed for the infant complainant, and on the same day, with wonderful celerity, a final hearing and decree war reached.

This court will, upon examination of the printed record, perceive that not a single witness was examined, and not a single deposition was taken on behalf of the infant.

The case against the infant was sought to be established by the evidence of Buckner, Burnside and Mrs. Jane C. Kingsbury, adverse parties of the boy, and also by the depositions of Barrett, Mitchell, Woodbridge and Shortall. Not a single cross-interrogatory was interposed by the guardian *ad litem*, nor any objection made by him to the competency of any of the witnesses, or any of the interrogatories in chief. A general saving of the objections going to the sufficiency, competency and revelancy of the evidence was embraced in the certificate of the circuit judge, but on appeal it was probably not thought essential for the proper preservation of the infant's rights to bring to the attention of this court any of such matters, and so it will be found that the brief for the guardian, and the former opinion of this court, are silent on such questions.

Certain matters appearing on the face of the record, but on the former appeal concealed from this court by an adroit abstract and the silence of those having the infant's rights in charge, should, it seems to us, be now considered by the court.

The guardian *ad litem* was appointed on November 25, 1870. (Rec., 43.) On November 22, three days before appointment, Buckner and wife, as cross-complainants, served notice that a commission would be sued out on the 30th to take the deposition of Buckner, to be read in behalf of himself and wife. (Rec., 68.)

Obviously a commission sued out against an infant on eight days' notice, when the law requires ten, is void.

The prospective guardian, however, *three days in advance of his appointment*, accepts service of the illegal notice, undertakes to assent that a commission shall issue at the time named, and to waive the notice required by law. (Rec., 68.)

No commission was sued out on this notice. Buckner's testimony was taken and read in evidence on the pretended authority of a commission, signed, sealed and tested on the 29th of November, of which no one ever had any notice whatever. (Rec., 67.)

Notice was served December 5, that a commission would be sued out on the 14th, nine days only, to take the evidence of William F. Barrett. The guardian *ad litem* accepted this illegal notice without objection, and undertook to stipulate it into sufficiency and regularity. (Rec., 95–6.) So far as shown by the record, nothing was done under this notification, and the evidence of Barrett appears in the record without the protection or warrant of any commission whatever.

We insist, hereafter, that Mrs. Kingsbury was incompetent to testify against her infant adversary, on this record, and that her evidence should be wholly disregarded in moulding a decree. For the present, the attention of the court is directed to some most remarkable features of this record, in connection with her testimony. Consulting the cross-bill (page 39), it will be seen that it incorporates the literal text of the letter of October 23, 1861, alluded to in Mrs. Kingbury's deposition, claimed to be a trust declaration.

This cross-bill was filed October 31, 1870, and never afterwards amended. The interrogatories to Mrs. Kingsbury, served with the notice, on November 25, are general and fishing in their nature. The enquiry is first for conversations, and then as to a letter or letters, referring to the conveyance by Buckner and wife. Nothing in the interrogatories, in any way, indicates knowledge, on the part of the questioner, of the existence or language of any such document as that apparently set out at large in the pleading of the month before.

Interrogatory 23, directing the witness to give the contents of any such letter or *letters*, if the originals, or copies, cannot be furnished, *because of loss* (Rec., 107), shows, conclusively, the groping character of the enquiry.

Mrs. Kingsbury, answering the 22d interrogatory, produces the letter, and annexes it to her deposition (p. 111), as the only one ever written by Henry W. Kingsbury, on the subject. In answer to cross-interrogatories 24 and 25, propounded by the solicitors of Mrs. Lawrence (Rec., 109), the witness says she does *not recollect that she had, at any time prior to the deposition, communicated the fact of her receiving such a letter, or of its contents, to any person.* (Rec., 114.)

This deposition was taken *December* 20, 1870. The final decree, prior to the first appeal is dated the 24th of the same month, and it must have taken fully the four days to receive the deposition at Chicago, from Old Lyme, Connecticut, where it was taken.

According to the face of this record, the cross-complainants paraded in their pleading of the 31st of October, the exact language, date and signature of a letter, and the purport of a conversation to which it referred, when they were not aware even of the existence of such a paper until December 20. The answer of Buckner and wife, filed the same day as the cross-bill, counts on the pretended will as a declaration of trust, but makes no mention whatever of any such letter. The answer of the guardian *ad litem*, filed December 2, while it deals specifically with every other subject and averment of the cross-bill of the Buckners, is silent on this letter, and joins no issue on the existence or terms of the document. The reason is obvious.

On October 31, 1870, when this cross-bill was filed, there was no allegation in it about this letter. Its existence and language, now thought so important, was then utterly unknown. After it had been fished up *de profundis*, on December 20, it is evident that in the unseemly haste with which this cause was driven to its first appeal, all these averments in the cross-bill touching this letter, and the conversation which gives it all its significance in the estimation of this court, were surreptitiously smuggled into the pleading; that there never has been any issue tendered or joined on that subject, and that the record on which the former opinion of this court was sought, was simulated and fraudulent.

The attention of the court has not been hitherto directed to the manner in which the first appeal was procured.

The replications were filed on December 24. Under the statute (Gross, p. 73, Sec. 34), the cause did not stand for hearing until next term, sitting in January. Inasmuch as the amount involved was unusually large, and one of the litigants an infant, it might reasonably be expected that after the closing of issues, there should be at least the statutory pause before they rushed to judgment.

But the campaign was to be short, sharp and decisive, and on December 31, precisely two months from the filing of the cross-bill, the record in a cause involving three-quarters of a million dollars of an infant's estate was closed by hearing and decree, and in the whole record there cannot be found one morsel of evidence, oral or written, which was introduced by the guardian *ad litem*, touching the vital question of the litigation. Crooked practice does not end here, for the final decree is ante-dated as of the 24th of the same month. It is not a *nunc pro tunc* entry. There can be no pretense that there was any submission, hearing or decree, as early as the 24th, for Woodbridge's deposition (Rec., 148) was not taken until the 28th, and yet it was used on the hearing. What is the meaning of this masquerading and falsification of dates; the device must have been adopted to subserve some purpose, but surely it is not essential to the success of an orderly judicial proceeding against an infant, that a false date should be inserted for the decree, instead of the true one. *Omnia presumunter spoiliatorem.*

The cause being thus disposed of in December at the Circuit, by the regular and due course of law would have been heard on appeal in the Supreme court for the Northern division. The succeeding term in that division would not occur until September, 1871, and so occasion a delay quite inconsistent with the celerity which had characterized the previous conduct of the cause. The Central grand division of the Supreme court held its session the very next week, but under the constitution of the state, had no jurisdiction to entertain the appeal.

Sampson v. *Alexander*, 5 Gilm., 261.
Owens v. *McKethe*, *ibid.* 79.
Goforth v. *Adams*, 11 Ill., 54.

The emergency was promptly disposed of by injecting into the final entry that the parties in open court agree that the appeal shall be prosecuted to the next term of the Supreme court, sitting in the Central grand division. (Rec., 56.) Of course the infant of eight years had no capacity to consent, and was not "in open court" consenting, but under a liberal reading of the constitution, and the comprehensive authority of a guardian *ad litem*, the latter person undertook to contract for the infant, and manufacture a jurisdiction, sitting in precisely four days thereafter, to adjudicate upon the ward's interests to the inconsiderable sum of $700,000.

The law explicitly declares that an appeal without a sufficient appeal bond cannot be sustained.

Gross Stat., 16, § 63.
Carson v. *Merle*, 3 Scam., 168.
Henderson v. *Fitch*, 19 Ill., 404.
Simpson v. *Alexander*, 5 Gilm., 260.
Pickering v. *Mizner*, 4 Ill., 334.

But again, the law was put aside with a stipulation whereby the guardian *ad litem*, waived the inflexible condition on which alone parties litigant can approach this court of last resort. (Rec., 50.)

There was no joinder on the errors assigned by the Buckners. The cause was submitted, however, early in January, 1871, at Springfield, in a compact argument for the infant of a page and a half.

In the early part of October, the decision of the court was announced, remanding the cause, with directions to dismiss the original bill absolutely, and to enter a decree giving effect to the trusts set forth in the cross-bill. No petition for rehearing was filed. On November 13, 1871, on the motion of Buckner and wife, a final decree was entered by the Circuit court, purporting to be in execution of the mandate of the Supreme court, declaring the trust, direct a conveyance by the master, and appointing commissioners to make partition of the property described in the decree. On January 22, 1872, these commissioners filed their report, and it was approved by the court, except as to certain property commonly known as the Spencer mortgage tract, touching the division of which certain

specific exceptions had been filed by the guardian *ad litem*. A writ of assistance placed Mrs. Buckner in possession of all the tracts vested in her by the confirmation. These two decrees of November 13, 1871, and of January 29, 1872, have been printed in full, and will be found in the record, pages 151–169.

In the latter decree the court below made an order directing a receiver appointed as the custodian of the property and funds in another cause, to report in this litigation his funds on hand (Rec., 170) and that report being made, the court, on the motion of Mrs. Buckner, ordered the receiver to pay over to her the full half of all insurance moneys collected by him without any reference to the payments made by him out of that fund on account of the trust estate in his custody. (Rec., 207.) On August 2, 1872, the objections of the guardian to the partition of the Spencer track were overruled, the report of the commissioners was approved and possession awarded. (Rec., 361.)

The infant by his guardian *ad litem* prosecutes an appeal, and assigns various errors.

I. *The court had no jurisdiction over the infant, to render the decree of November* 13, 1871, *on the so-called cross-bill.*

The scope of the original bill, filed in the name of the infant, was to set aside the cloud arising from the probate of a pretended will, executed by Henry W. Kingsbury, under which the defendants claimed, as devisees and executors. Obviously the inheritance of the boy in Illinois was in no peril, even if, on the prayer of a cross-bill, the will should have been established. If valid as a testamentary document, all its devises would have abated in the interest of the posthumous heir, who was neither provided for nor disinherited. (Gross Stat. p. 800, Sec. 10.)

But no cross-bill was filed, asking in any manner to sustain the will or the devises under it, but an entirely new, distinct and different litigation was thrust into the record, and a trust sought to be engrafted on a deed made to the complainant's father nine years before, a decree for title and a conveyance to one full half the infant's property was prayed, and then as corollary, partition, assignment of dower and an account of the rents and profits since 1861.

The controversy in a Chancery court must be a unit; and a complainant is not within the jurisdiction of the court as to any other matter except that set forth in his bill. Any other practice would be unfair, dangerous and slovenly. A cross-bill, *ex vi terminorum*, implies an auxiliary bill, a mere dependence, touching the matter in question in the original bill. The validity and effect of the alleged will, set forth at large in the bill, is the only subject of controversy or "matter in question" in the suit as brought. The only charge against the Buckners was, that they pretended it was valid, and the devise to them effectual, and the only prayer was to remove the cloud occasioned by such claims. The original bill no where, even remotely, alluded to any other pretension of the Buckners, except as devisees to a third of the estate, under a paper which they were in-

dustriously and promiscuously undertaking to probate. The contention as to the validity of this will was practically abandoned in the progress of the cause, and an inconsistent and different controversy was introduced, impeaching the face of an absolute deed executed to the complainant's father in 1861 claiming equitable ownership of half the infant's estate, praying an account against the infant as a constructive trustee, for partition and the assignment of dower. All this is utterly foreign to the matter in question on the bill, does not grow out of it, and is irreconcilable with it.

The original controversy about the validity of an unattested will, contrary to the rules of law, was converted by the Buckners into a struggle to convert a deed absolute into a naked trust to hold title for them, and obtain a decree investing them with legal ownership in a moiety of a large estate, which had remained in the unchallenged custody of those holding for the boy for over seven years.

On the inspection of the conflicting and dissimilar character of the issues on the bill, and the pleading termed a cross-bill, it would seem to be clear, on reason and the authorities, that the Circuit court obtained no jurisdiction to adjudge or decree touching the new litigation introduced in the record by the latter pleading, and that if the objection had been made *in limine*, it would have been sustained. The general doctrine touching the restrictions under which courts of equity have authority to decree matters of cross-bills is statad by the text-writers.

3 Daniel Ch. Pr., 1742.
Adams Eq., 304, n. 2.
Story Eq. Pl. § 389.

Obviously, to determine whether under the rule a particular cross-bill is germane to the original controversy wherein it is filed, can be determined only on an inspection of the record. The cases below are cited, however, as applications of the general principle wherein courts refused to decree on new controversies introduced by cross-bills:

Cross v. *De Valle*, 1 Wallace, 5.
Daniel v. *Morrison*, 6 Dana, 187.
Galatin v. *Erwin*, 1 Hopk. Ch. 66.
Griffith v. *Merritt*, 19 N. Y., 529.

According to the ordinary chancery practice, the Circuit court obtained no jurisdiction over the defendant to a cross-bill until he had been regularly served with process to answer, or, being under no disability, voluntarily submitted himself to the jurisdiction. Nor was it allowed to make use of any substituted service on the solicitor or agent of the complainant.

1 Hoff. Ch. Pr. 355, Ch. 10, § 3.
Anderson v. *Lewis*, 3 Bro. C. C., 429.
Bond v. *Newcastle*, *ibid.*, 386.
Ballance v. *Underhill*, 3 Scam., 462.

In the case at bar, the original complainant was a non-resident infant. On the filing of the cross-bill of the Buckners, they moved for the appointment of a guardian *ad litem*, and that the guardian should answer for the infant in ten days. No jurisdiction to decree the matter of the cross-bill was obtained, either by the service of process on the infant, or by publication. There was neither. The foundation of the jurisdiction rests altogether on three facts—the filing of the pleading, the appointment of the *guardian ad litem*, his voluntarily filing an answer in the name of the infant.

Is this sufficient in any case to authorize proceedings on a cross-bill against an infant complainant? We concede that the statute passed since the decision on *Ballance* v. *Underhill* has removed the necessity of process in cross-bills in those cases to which it applies. (Gross Stat., 72, § 26, *et seq.*)

We conceive, however, that those sections have no reference to infant complainants, and that as to them the ancient practice is unaltered, and that no decree can be rendered on a cross-bill against a minor until he has been served with a process of the court. The statute in question apparently proceeds upon the theory that as the complainant voluntarily submits himself to the jurisdiction, he cannot complain if his adversary demands affirmative relief against him on equities connected with the identical litigation put in motion by himself.

Suits are instituted in the name of infant complainants without knowledge or volition on their part, and the degrees therein work no estoppel which the minor cannot afterwards gainsay on proper hearing. There are numerous provisions of the chapter regulating chancery practice, which can have no application whatever to infant litigants, although they are not specifically excepted from their operation.

For example, section 20 requires every defendant served with process to appear and answer the bill within the time limited, or the matter thereof will be decreed *pro confesso.*

Sec. 22 requires the defendant to answer fully, and upon oath to all the averments of the bill exhibited against him.

Sec. 24 authorizes exceptions to be filed to all answers for insufficiency. Assuredly none of these provisions can be put into practice in litigation with minor defendants.

Process on cross-bills is only impliedly abolished, and that by the language of Secs. 26, 27 and 28 of the chapter regulating practice in chancery. The first of the sections authorizes the defendant to file "a cross-bill containing interrogatories, and call on the plaintiff to answer the same." By Sec. 27, the answer to the cross-bill shall be evidence in the same manner as the defendant's answer to the bill, and by the succeeding section, if the complainant does not answer the cross-bill exhibited against him within the time limited, his own bill can be dismissed, and the court decree in the cross-cause *pro confesso.*

While these sections are couched in general terms so as appar-

ently to include all plaintiffs, it requires no argument to establish that infants are necessarily emancipated from their operation. Apply familiar tests. Interrogatories cannot be directed to an infant; an infant is not ruled to answer a cross-bill; he never does answer it; the answer to a cross-bill against him never can be evidence in the cause, and no court would decree against an infant for a default of which he was incapable. It will be noted also that the practice adopted on filing this cross-bill was not in accordance with Sec. 26. A guardian *ad litem* was appointed, and *he* was ruled to answer for the minor. If the infant had first been properly served, this would have been the ancient, and not the statutory practice. For says Macpherson:

"An infant's answer is in reality not the answer of the infant, but of the guardian who is sworn, not the infant."

Macp. on Inf. 405.
Bulkley v. *Van Wick*, 5 Paige, 536.

If Sec. 26 does not apply to infant defendants to a cross-bill, then by Sec. 1 of the same chapter they are to be dealt with "according to the general usage and practice of courts of equity." (Gross, 69.) By that general usage the service of process was indispensable to the exercise of jurisdiction, and in this case that was lacking.

The character of this cross-bill has been previously stated. Though filed as a cross-bill, it is an illegitimate, and is in substance and legal effect an original bill, and did not attach to the main controversy. Whatever the rule as to ordinary cross-bills, a decree upon it should be based on process, and not hinged on the initial litigation with which it had no concern.

That under any circumstances a trust can be declared, a reconveyance procured, partition obtained, dower assigned, and an account taken against an infant in a suit brought in his behalf merely to set aside the probate of an alleged will, might subject the procedure to the charge of loose practice, but that all that relief can be obtained as merely auxiliary to such original issues, and without any process whatever, is to state a case for which the file affords no precedent.

Unless it be sound doctrine that a plaintiff suing in chancery for one purpose is subject to its decrees for all purposes, that a defendant summoned to a specific controversy by an infant plaintiff, may straightway constitute himself *dominus litis* and procure a decree against the minor upon any foreign matter that he may choose to inject into the record in the guise of a cross-bill, it is hardly practicable to sustain the decrees against the appellant.

Galatin v. *Erwin*, 1 Hopk. Ch., 48.
Fletcher v. *Wilson*, 1 S. & M. Ch., 376.
May v. *Armstrong*, 3 J. J. Marsh, 260.
Johnson v. *Johnson*, 1 Dana, 304.
Carrington v. *Brent*, 1 McLean, 174.
Walker v. *Hallett*, 1 Ala., 379.
Graham v. *Sublett*, 6 J. J. Marsh., 45.

If the position for which we have contended be the true one, there is a fatal vice in these proceedings which the court must notice at any stage, and vacate the several decrees which have been procured against the infant, depriving him of his inheritance without bringing him before the court.

The swiftly stipulated appeal to the Central Grand Division did not cure this original want of jurisdiction over the person of the infant and the subject-matter of the cross-bill.

That court *prima facie*, had no jurisdiction over the appeal. This is so ruled and as a question of *jurisdiction*.

Simpson v. *Alexander*, 5 Gilm., 261.
Owens v. *McKebbe*, *ibid.* 71.
Goforth v. *Adams*, 11 Ill., 54.

This want of jurisdiction in the Appellate court cannot be remedied by any reliance on the contract of the guardian *ad litem*. That the law gives him no power whatever to bind the minor by any consent or waiver is a proposition too thoroughly established to require any argument. The infant was incapable of consent, and the guardian had no capacity in law to consent for him. Public policy and the uniform voice of the authorities prohibit it.

Nor was there any joinder in error in the appeal taken by the Buckners in their cross-cause so as to give even the semblance of jurisdiction over the infant appellee at the January term, 1871, at Springfield. (Rec., 150.)

Hagar v. *Phillips*, 13 Ill., 292.
Abraham v. *Pancroy*, 13 Ill., 298.
Woodside v. *Woodside*, 21 Ill., 207.

II. *The decree of November 13 was rendered without sufficient proof against the infant.*

The decree was rendered without sufficient proof. The certificate of evidence shows what testimony was used to make out a case against the infant. There were examined on behalf of the Buckners, General Buckner himself, Barrett, his attorney and scrivener, Burnside and Mitchell, his agents, Mrs. Jane C. Kingsbury, Woodbridge and Shortall. No witnesses were examined for the boy, and none of the cross-complainant's witnesses were challenged for competency, or cross-examined for the infant. The cross-complainants were permitted to make out the precise case they pleased, without let or hindrance. The challenge for competency, which should have been made in December, 1870, we propose, with due submission to this court, through which such evidence has been once successfully smuggled by the laches of the infant's representative, to now urge.

To authorize a court of chancery to take away the inheritance of an infant, the hostile equity must be established by sufficient

proof, and that term, of necessity, imports that it shall be sufficient in degree and of unquestioned competency.

An incompetent witness is no witness, and however direct, circumstantial and conclusive on the issue his oath may be, no court of chancery can give ear to it or make it, to any degree, the foundation of a decree against the minor. An adult may waive objections going to the competency of witnesses, but neither the infant nor his solicitor or guardian *ad litem*, nor any court, either Circuit nor Appellate, can waive an objection of this character or enroll a perfect judgment against the minor, on the illegal testimony of an incompetent witness. At any point of the proceedings such an irregularity can be and should be urged by the guardian, and if he collusively or negligently fail in this duty, the court, as the general guardian of infants, will make the objection *sua sponte*, and annul any judicial proceedings based on such illegality.

The testimony of Simon B. Buckner was and is illegal, and cannot be considered by this court. Our objection goes both to form and substance.

As to form. His evidence was taken at Louisville, Kentucky, under the authority of a commission, sued out on November 29, 1870, under section 15, 18 Gross Stat., p. 270, 271. This statute is in derogation of the common law. It must be substantially complied with, and any material deviation from its requirements vitiates the deposition as testimony.

Corgan v. *Anderson*, 30 Ill., 95.

And this construction accords with the plain reading of the statute, for by section 19, page 272, only those examinations and depositions which have been taken and returned *according to the provisions of the chapter*, can be read as *good and competent evidence* in the cause.

This deposition was not so taken, and is not good and competent evidence in the cause.

The *dedimus* is dated November 29, 1870. (Rec., 67; Abst., 5.) It has for support a notice (Rec., 68; Abst., 5) that such a commission would be sued out, not on the 29th, but the 30th. This deposition of Buckner's was, therefore, taken on a commission sued out without any notice at all. The notification that a commission issued or sued out on the 30th will not validate one issued on any other day. Under this void commission no authority vested in the commissioner to administer an oath, or take or certify a deposition. The notice attached has divers imperfections. It is dated and served November 22d, on a pretended *guardian ad litem*, and notifies him that a commission would be sued out on the 30th of the same month. The law requires as an indispensable pre-requisite to a *dedimus* at least ten days' notice, and an eight day notice to infant is, of course, a sheer nullity. There appears to be an acceptance of service, but on November 22d there was no *guardian ad litem* to

accept service. His signature and waiver was a mere act of usurpation. He was not appointed until November 25th (Rec., 43; Abst., 3), so that the catalogue of stipulations for the infant, which infests this record was in reality begun by the *guardian ad litem* three days before his appointment. Yet, on the rotten footing of such a commission, and such a notice, and such a consent, the deposition of Simon B. Bucker crept into the record and was permitted to pass through two courts unchallenged in the smallest particular.

At the beginning of considering this business of testing a record, not by the law and the accepted course of chancery practice, but as justified under cover of promiscuous stipulations and waivers of a guardian *ad litem*. we contest the good faith of the practice and the sufficiency of all judicial proceedings based on such waivers. The practice is collusive on its very face, and fruitful of a thousand mischiefs and frauds. If a guardian may waive one provision of law and thus bind his ward, he may another; and thus an infant's cause would come to be managed according to the arbitrary compacts of his guardian and his adversary, instead of the wholesome provisions of the law. A cause against an infant proceeds at the peril of the party prosecuting it. *Ita lex scripta est* is the only maxim under which the actor in a litigation with an infant can justify. When in such proceedings plain requirements of law are disobeyed, it does not condone the vice to assert that the guardian *ad litem* has waived obedience or has expressly stipulated that the law shall be broken. The courts' decline to to inquire whether such contracts are, in the particular instance, made in good faith or not. In general reprobation of the practice, the law has wisely taken from the guardian *ad litem* all capacity to add to or subtract one tittle from the law or usage. Upon this subject the authorities are in complete harmony.

Dow v. *Jewell*, 1 Foster (N. H.), 486.
Tuttle v. *Garrett*, 15 Ill., 354.
Bank of U. S. v. *Ritchie*, 8 Peters, 46.
Rhoads v. *Rhoads*, 43 Ill., 239.
Fischer v. *Fischer*, 54 Ill., 231.
1 Daniel Ch. Pr., 97.
Story Eq. Pl., § 59.
Enos v. *Capps*, 12 Ill., 255.

Buckner was an incompetent witness.

He is a party to the cause, interested adversely to the infant.

His incompetency at common law cannot be questioned. A beneficiary cannot be heard to establish a trust in his own favor.

1 Dick, 397.
Hill on T., 60, 94.
Mixell v. *Lutz*, 34 Ill., 382.
2 Danl. Ch. Pr., 1,035, 1,037.

The vital portions of his testimony consists of his statements of

the parol declarations of a deceased person, for the purpose of divesting the title of the infant heir and establishing a trust for his wife and himself.

Such testimony is expressly prohibited by the law of 1867, touching the competency of witnesses in civil causes, and was taken and used in flagrant violation of the provision of a peremptory enactment. (Gross' Stat., p. 274, Sec. 33, *et seq.*)

Notwithstanding the great modification of the law of evidence in these latter years, no statutes of any of the states, so far as our examinations have extended, tolerate so gross a departure from the ancient principles rendering witnesses incompetent through interest, as is attempted in this proceeding.

Congress, by the act of March 3, 1865, 13 Stat. at Large, 533, enacted in substance the same law enlarging the competency of witnesses, and guarded with the same exceptions which has been in force in Illinois.

On a question arising under that act as to the right of a litigant to testify who was similarly situated to Buckner, BRADLEY, J., thus disposes of it:

"This act is a recognition of the glaring injustice it would involve to permit one party to propound himself as a witness in his own behalf as to a transaction between him and a deceased person, who can no longer give his version of the affair.

"If the law were to allow a man to wait until his antagonist was dead, and then sue his heirs and put himself in the witness stand to give his version of the affair with no one to contradict or qualify his testimony, it would be as gross a prostitution of the forms of law as to allow a man to be judge in his own cause. Every honest mind revolts against it."

When pressed to make use of the discretion vested in the court, to call the witness, he declined, saying:

"This case is one in which it would be eminently improper to allow the evidence. The complainant seeks to set up a parol trust in property conveyed away by him over twenty years ago, and possessed by the grantees and his heirs ever since. It would be most dangerous to allow a party to prove his own case under such circumstances, after his grantee was dead. *No man's property would be safe under such a rule of evidence.*"

Eslava v. *Bk. of Mobile*, 3 Chi. Legal News, 297.

We commend these earnest and wise words to the special attention of this court, before they seal with final approval a decree establishing a trust in favor of Simon B. Buckner and wife, by the oath of Buckner as to the parol declarations of an infant's ancestor.

The State of Indiana has a similar law on her statute book, and the Supreme court, in giving construction to the exception prohibiting the testimony of adverse parties in cases where heirs were parties, say:

"The evident intent was in suits by or against heirs, to exclude the testimony of the parties to the action as to any matter which occurred prior to the death of the ancestor, so as to prevent the living from testifying against the representatives of the dead. Death having sealed the lips of one, the law seals the lips of the other."

Malady v. *McEnary*, 30 Ind., 278.

Precisely this question has received recent examination by this court, and it is persuasive testimony of the gross laches which characterizes the conduct of the defense to the cross-bill, that the very case we are about to quote was not cited to the court in the former appeal. The case is *Fischer* v. *Fischer*, 54 Ill., 231, and is exactly in point and decisive on the question of Buckner's incompetency.

The points of resemblance are perfect. There an action was brought to charge a trust on lands descended to an infant. That is this case. By reason of transactions with the minor's deceased father; so in this case. The complainant there testified in the cause, as to the parol declarations of the deceased, and procured a decree establishing the trust. So here. The guardian *ad litem* did not there object to the testimony, when offered, or assign any error on appeal which is the history of this record.

That decree was scourged from this judgment seat, with this indignant dismissal:

"This record seems to show a contrived case by which this infant, 'muling and puking in its nurse's arms,' the only heir at law of his deceased father, in whom the legal title to this lot had been legally placed, was to be deprived of his estate by the combination of complainant and his mother, Christiana Wilmuller. *The complainant was not a competent witness to prove his own case, not having been called by the adverse party to testify. He was incompetent at common law. Mixell* v. *Luts*, 34 Ill., 382; *and also by the terms of the second section of the statute relating to the competency of witnesses in civil cases. Sess. Laws, 1867, page 183, not being within any of the exceptions of that act. The court erred in rendering a decree on complainant's testimony. The testimony of the other witness was not taken under the order of the court, and the guardian had no power to consent to its being taken as against the infant. The decree must be reversed and the cause remanded.*"

Besides the unimpeachable authority of *Fischer* v. *Fischer*, the statute and exceptions have received at the hands of this court in other cases, the construction for which we contend.

Boynton v. *Phelps*, 52 Ill., 210.
Waterman v. *Spalding*, 51 Ill., 425.
Holloway v. *Galloway*, 51 Ill., 159.
Stevens v. *Hoy, Admr.*, 4 Chi. Leg. News, p. 202.

Buckner was also incompetent to testify in the cause, because his wife was a party in interest on the record.

The language of exclusion employed by the statute is unambiguous and imperative.

No husband or wife shall, by virtue of section 1 of this act, be rendered competent to testify for or against each other, as to any transaction or conversation occurring during the marriage," except in certain cases, none of which apply to this record. *Vide* also,

Waddams v. *Humphrey*, 22 Ill., 661.
2 Stark on Ev., 549, and cases cited.
Fitch v. *Hill*, 11 Mass., 286.

Public policy will not tolerate the production on the witness stand of a husband, to testify directly in behalf of his wife. The interest is too immediate and powerful to be consistent with an impartial oath. Oral communications between man and wife are, in the absence even of such special statute, regarded as sacred and beyond the ken of courts of justice. In this record, in most unblushing defiance of law and precedent, we are treated, by Gen. Buckner, to lengthy and touching rehearsals of conversations between himself and wife as to their property interest, and introduced for the purpose of jostling the title of the infant. (Rec., 80–83; Abst., 5.)

This provision of the statute has also received uniform construction.

Reeves v. *How, Ex.*, 4 Chic. Leg. News, p. 5.
Phares v. *Barbour*, 49 Ill., 371.
Neubrecht v. *Santmeyer*, 50 Ill., 76.

The case of *Reeves* v. *How* is a recent and most elaborate examination of the statute in question, and decides that the testimony of a wife in behalf of her husband is excluded, not only by the fair intent and meaning of the law, but also on the ground of public policy.

It does not seem to us possible, on the plain reading of the statute and its obvious policy, as enforced by these direct authorities, that Gen. Buckner's testimony can be lawfully considered in determining this cause. We claim for the infant the full benefit of that enactment, as it was enforced in *Fischer* v. *Fischer*, and in *Reeves* v. *How*.

If that law seals his lips and denounces him as incompetent, a decree gained by his oath is bottomed on an illegality, which no laches of a guardian *ad litem* can consecrate. It will be observed that in the case of *Fischer*, this court deemed the mere failure of the guardian *ad litem* to object to such an incompetent witness, as evidence of a collusion to attempt to wound the cause of the infant.

If Buckner's deposition is to be excluded for the objections of form and substance which have been for the first time brought to the knowledge of the court, it will be found on analyzing the record that

the remaining evidence is not sufficient to support any decree whatever establishing a trust against the estate vested in the heir of Henry W. Kingsbury, deceased. To show how absolutely essential the testimony of Buckner is to support the decree, it is only necessary to refer to the prior opinion of this court. The evidence of Buckner is quoted and made use of on seven different occasions in the opinion, Mrs. Kingsbury's only twice, and the testimony of the remaining witnesses is scarcely, if at all, mentioned.

The pith of the opinion is stated in this language, in considering the effect of the conversation with Kingsbury, testified to only by Buckner, but "by the very words which made it (the deed) operative was created a trust by contract which, if manifested and proven by some writing signed by the grantee as required by the statute of frauds, is valid," as (Rec., 52).

That real or pretended conversation, eliminated from the record with the exclusion of Buckner's testimony, and the failure of the whole case is palpable. The controversy derived a complexion from that conversation which lasted through the opinion, as will readily be seen. There is no competent evidence in the record that there ever was such a conveyance as that set forth in the cross-bill except the copy attached to Buckner's deposition as an Exhibit, (Rec., 72; Abst., .) If the deposition is excluded, all the evidence of the existence or terms of the pretended trust conveyance is wanting.

The conveyance exhibited with the cross-bill is expressed to be, not only on a valuable, but a blood consideration, (Rec., 72). Buckner testified that no valuable consideration passed, and that it was not intended for a gift. There was no other direct testimony to this point, (Rec., 82; Abst., 5.)

To explain the devise of only one-third in the will, Buckner testified as to the previous division of the income between the two heirs and the dowress in thirds. No other proof was advanced upon that point.

It is stated in the opinion as a proven act of much importance, that the conveyance was signed, sealed and acknowledged, without the previous knowledge or assent of Kingsbury, and surely this appears only in the evidence of Buckner.

Without prolonging this examination further, we think it cannot be even plausibly contended that the case made by the cross-bill is sufficiently proven, or that the decree can be sustained if the testimony of Buckner be excluded

We apprehend, moreover, the correct rule to be, that if illegal testimony has entered into and formed an ingredient of the decree, that it must be reversed.

The deposition of Barrett is illegal and his testimony incompetent.

Accompanying Barrett's testimony is a notice (Rec., 9; Abst., 5), that a *dedimus* will be sued out on December 14th, to take his deposition at Louisville. This notice is illegal, being dated on the 5th, only nine days intervening instead of the period required by law.

The notice is backed, however, by the ubiquitous consent and waiver of the *guardian*. According to the record no commission was ever issued or returned, and the deposition stands in the certificate of evidence as taken without any authority of law whatever. Even if one had been issued in conformity to the illegal notice, it could not, according to the statute, be read against the infant, or make any part of the record.

Some of the evidence in this uncommissioned deposition, as to the conveyance in controversy, is unique. Barrett, it seems, drafted the deed. (Rec., 100.) Interrogatories 9 and 11, by Buckner and wife, call on the witness to give in evidence their intentions as expressed in their declarations to him in the absence of all other parties, for the purpose of engrafting a trust on their absolute conveyance, afterwards executed.

1 Hill on T., 93.
Lloyd v. *Inglis, Ex.*, 1 Desau, 333.
Harris v. *Barnett*, 3 Gratt., 339.

With reference to the depositions of Jane C. Kingsbury and Ambrose E. Burnside, the same observations which we have submitted touching the competency of Buckner's testimony, on the ground of adverse interests, will apply to them.

They are both parties to the record; they are both interested in the litigation adversely to him, and the object of that litigation is to reach property descended to him as heir, and their testimony is confined so far as it touches the merits, altogether to matters occurring before the death of Henry W. Kingsbury, and chiefly to conversations with him in 1861. For such reasons their evidence is prohibited by law.

Mrs. Kingsbury's deposition illustrates most conspicuously the necessity for the most rigid enforcement of the statute requiring trusts to be manifested and proven in writing. The conversations were in 1861. Her deposition was taken in December, 1870. The witness was then in her sixty-first year. Necessarily the lapse of time had clouded her memory, and yet she undertakes to give not simply the substance and general tenor, but the actual words of two different conversations held nine years before. Lord Coke speaks of the "uncertain testimony of slippery memory," and the consequences which the slightest slip or failure of remembrance may produce. It is here insisted against the heir that the recitals of the language used in a nine year old conversation, by a person of the advanced age of sixty-one years, is to be imported into a writing, and become potent to shift titles.

Of the depositions of Mitchell, Woodbridge and Shortall, little need be said.

They have no relevancy to the establishment of the main proposition of the decree that Henry W. Kingsbury held the property described in the deed as a naked trustee for title only. They are

directed to minor points of no particular significance unless the main theory of the trust be first satisfactorily established.

It is to be noted, however, that in each instance these depositions appear to be taken, not under any authority of law, but by the consent of the guardian *ad litem*. (Rec., 132, 148; Abst., 7, 8.) Woodbridge's deposition was not taken until December 28, 1870, (Rec., 148; Abst., 8), and yet by some strange legerdemain it was used and considered on the hearing of the cause, which is fixed by the record to have been on the 24th, four days previous.

This instance of taking time by the forelock is only surpassed by the remarkable prescience displayed in pleading the exact contents of a letter as early as October 31st, the existence of which was not disclosed by the custodian to the pleader until December 20.

Of course we anticipate that it will be suggested, in avoidance of these positions, that the decree of November 13th, was rendered on the evidence in the record, and also in pursuance of the mandate sent down to the Circuit court as a result of the former appeal. It seems to us that the answers to this suggestion are complete. If our theory of the law be sound as to the necessity for procoss on inf. nt defendants to all cross-bills, or on a cross-bill which is in effect an original bill, or if we be correct in our views as to the want of jurisdiction in the Appellate court, founded on the mere consent of the guardian, the fatal vice is sill in the record, and the court must at any point in the litigation lay the axe at the root of these proceedings. The question of jurisdiction is always examinable.

Nor do we think the opinion on the former appeal forecloses the inquiry which we have pushed, as to the competency and regularity of the evidence on which the decree is based. At all events the particular decree of November 13, 1871, in which error is assigned, is before this court for the first time, and we have the unquestioned right to now insist that it is not in accordance with the mandate, and also that the decree is rendered on the unauthorized use of testimony prohibited by law.

Given the premises, (1) that Buckner, and Mrs. Kingsbury, and Burnside are not competent to testify against the infant; (2) that without their testimony the case is unproven; (3) that on an appeal to the Supreme court, the question of the competency of the witnesses was not ruled, because the guardian *ad litem* neglected to raise the objection, and it was inadvertently overlooked by the court, surely on a second appeal this tribunal will not seriously give ear to an argument that it is somehow estopped from considering such a blemish in the proceedings, because it had escaped detection in the former consideration. If the law does in fact seal the lips of these adverse parties to the record, and prohibits the use of their evidence, it assuredly furnishes at all times the rule of decision for this court. To sustain the decree they have procured, the cross-complainants must satisfy the judgment of the court that the witnesses, upon whose oaths it is builded, were competent under the statute and their depositions clothed with the necessary legal formalities.

III. *The decree of November 14, 1871, was collusively obtained against the infant, and is manifestly unjust.*

We take as true these axioms of equity:

That courts of chancery are the guardians of infants; that they exercise comprehensive jurisdiction over their persons and property, and take such action as will protect them.

2 Story Eq., § 334.

Accordingly, an infant may impeach a decree against him either for error or fraud, and this by original bill, and is not driven to his bill of review.

Adams Eq., 420.
Effingham v. *Napier*, 2 P. Wms., 402.
Effingham v. *Napier*, 3 Bro. P. C., 340.
Lloyd v. *Malone*, 23 Ill., 43.
Hess v. *Voss*, 52 Ill., 478.
Bk. of U. S. v. *Ritchie*, 8 Peters, 143.
Long v. *Mulford*, 17 Ohio S., 484.
Kirchenbeiser v. *Beckert*, 41 Ill., 172.
Johnson v. *Johnson*, 30 Ill., 215.

The fraud in a decree may be either in fact or in law. If the decree was procured by the collusion or gross neglect of the guardian *ad litem*, or is manifestly unjust, it establishes a case of fraud relievable in equity. This, for the reason stated by Macpherson, that in the eye of equity it is a fraud for a litigant to take advantage of the neglect of the guardian, and the inability of the infant to defend himself.

Macph. on Inf., 431.
Bing. on Inf., 135.
Dows v. *Jewell*, 1 Foster (N. H.), 486.
Sconce v. *Whitney*, 12 Ill., 150.
Knickerbocker v. *De Forest*, 2 Paige, 304.

In the leading authority on this subject, a decree against an infant was opened on the ground that the conduct of the causes had been mismanaged by the solicitor.

Effingham v. *Napier*, 2 P. Wms. 401; *ibid.* 3 Bro. P. C., 340.

In another cause relief was given, because the infant *had grounds of defense which were not brought to the attention of the court or insisted on at the hearing.*

Lloyd v. *Mansel*, 2 P. Wms., 73.
Sheldon v. *Fortescue*, 3 P. Wms., 111.

The master principle established by these authorities is, that in the promotion of a suit in equity to touch the estate of an infant, the

court demands *uberrima fides* from the guardian and the adversary, and will not tolerate the semblance of collusive conduct or any stratagem to secure an advantage over the infant. In this respect the case must be without blemish.

In coming to an intelligent judgment as to the good faith of this litigation, we ask the court to consider:

That the guardian *ad litem*, agreed to an illegal notice to take Buckner's testimony.

He made no objection to the deposition when returned under a void commission.

He made no objection to the incompetency of Buckner to establish a trust for himself and wife by his own oath.

He made no objection, for the infant, to a single interrogatory propounded to Buckner.

He accepted an illegal notice to take Barrett's testimony, and made no objection to it when returned.

He made no objection to the general competency of the witnesses, Jane C. Kingsbury and Burnside, or specifically to any single interrogatory.

He consented to the taking the depositions of Woodbridge, Shortall and Mitchell in a manner not authorized by law.

No process or publication was ever taken out on the bill of the infant. The litigation was conducted in all respects like an agreed case.

The guardian *ad litem*, called no witnesses, and cross-examined none.

He consented to and expedited a final hearing on the very day the issues on the original bill were closed by replication, when under the law, the cause did not stand for hearing until the next term, sitting the third Monday of January. (Gross Stat. p. 73, § 34.)

He consented to and expedited, so the former brief of counsel advises us, *pro forma* decrees in the court below, so that, in fact, there never was any *bona fide* hearing.

"It is the policy of the fundamental laws, that all questions of law should be subject to at least two solemn considerations and decisions before they should be considered as finally settled and determined, and that in their final determination the court should have the advice and assistance resulting from the consideration and decision of the inferior tribunals."

Crull v. *Keener*, 17 Ill., 247.

He permitted the cross-bill to be tampered with after issue joined upon it and without the authority of the court, by importing into it new and important matter, thereby causing his ward's interests to be tried by a false record.

Instead of requiring the cross-complainants to follow what this court has termed "the proper and convenient practice," and procure a reference to the master to take the evidence and report the facts,

McClay v. *Norris*, 4 Gilm., 370,
Enos v. *Capps*, 12 Ill., 255,
Cost v. *Rose*, 17 Ill., 276,

he habitually promoted the taking and use of *ex parte* depositions, in distant states before unofficial commissioners, and with every opportunity to fabricate and distort testimony.

He consented, for some reason not of record, that a false date should be given of the final hearing and decree, instead of the true one.

Instead of requiring the infant's adversaries to appeal in the ordinary manner required by law, he consented his ward's case into a court sitting in four days thereafter.

He filed no abstract of the record, allowed the cross-complainants to submit the cause upon an abstract which concealed from the court all knowledge of the divers irregularities committed in taking the depositions relied on.

He failed to bring the infant's whole defense to the notice of the court, or to assign proper errors.

The cross-complainants profited by this collusion or gross neglect on the part of the representative of the infant, and are now in the possession of the fruits of the victory over this masterly inactivity.

Does such conduct of an infant's litigation, involving such large interests, come up to the standard required by a pure administration of justice? Has the defense been vigorous? Has the infant had all his rights protected? Has the appointee of the court pushed all the defenses of which the record gives him advantage? Has there been no stratagem by which the infant's rights have been impaired? In short, has the practice of a court of Chancery, as against its own ward, degenerated into such intolerable chaos and injustice, that a decree so obtained is without error and manifestly just?

In all the varied experience of this tribunal can a single instance be found where a case of such magnitude was so openly and swiftly given away. From the beginning of the controversy, October 31st, to its appeal in January following, it was conducted with the unseemly haste which distinguished the ancient *pie poudre*. If fraud was in truth deliberately planned to appropriate an infant's property, by altered cross-bills, false records, void commissions, illegal testimony, a fabricated appeal and general inertness on the part of the guardian, there would seem to be a complete adaptation of the means to the end.

We insist, considering the mysteries of this record collectively, "with all its imperfections on its head," that the decree cannot be sustained. If men are presumed to intend the necessary consequences of their conduct, it is conclusively established that the cause of the infant has not had fair play, and that it was rushed through with lawless tactics and unseemly haste, with that precise purpose in view.

IV. *The decree of November 13, 1871, is contrary to law.*

We concede that, except in some few particulars noted elsewhere, this decree was rendered in pursuance of the opinion and mandate of this court on the former appeal. The principles of law therein announced are, of course, binding on the lower court, and on all parties in the record, as the pronounced law of Illinois, until qualified by this tribunal. Without desiring to engage in any unseemly contention with the court as to the soundness of the construction of the statute of frauds there announced, we respectfully ask the court, if deemed essential for the protection of the minor's rights, to re-examine the legal conclusion on which the former appeal went off.

It is evident that the opinion on that point proceeded *dubitante*, and that the court felt itself far from strong in the judgment which was reached, and that the case stood on the very boundary of the law.

The legal proposition which we respectfully conceive to be unsound is this:

"Where there is any written evidence showing that the person apparently entitled is not really so, parol evidence may be admitted, to show the trust under which he actually holds the estate;" and, as otherwise expressed: "If letters afford evidence of the existence of a trust, the terms may be supplied *aliunde*."

As authority in support of these propositions is cited the text of Brown on Statute of Frauds, § 111, who in turn relies on *Cripps* v. *Jee*, 4 Bro. C. C., 472; *Hutchen* v. *Lee*, 1 Atk., 447. Consulting Brown it will be found that while he states such a proposition at the commencement of the section, he uses this language at the conclusion:

"*It would seem that the exception established in Cripps* v. *Jee, in favor of trusts partly manifested by writing is difficult to reconcile with the plain language and policy of the statute requiring the trust (that is, the whole trust) to appear by written evidence.*"

Hillon T., page 62, merely states the proposition, gives *Cripps* v. *Jee*, as the only adjudication supporting it, and neither discourses upon or approves it. The opinion quotes with approval:

"If there be written evidence of the existence of such a trust, the danger of parol declarations against which the statute is directed, is removed." And to support this is cited *Forster* v. *Hale*, 3 Vesey, Jr., 696.

And it is also observed, "and it appears from *Forster* v. *Hale*, (and other authorities), that if the letters afford evidence of the existence of a trust, the terms may be supplied *aliunde*."

Surely this in wise appears in that case. It was an action to establish *by letters and entries in the account books of the defendant*, that he was a trustee for the fourth of a colliery for himself and the plaintiffs in equal shares. *There was no parol evidence whatever*

used or offered to supplement the writings, and the master of the rolls, in dealing with the question as to what the writing should manifest, says, page 706, immediately following the citation made use of by this court:

"*I admit, it must be proved in toto, not only that there was a trust*, BUT WHAT IT WAS."

Tawney v. *Crowther*, 3 Bro. C. C., 262, was not a case of trust at all, but a bill to compel a specific performance of an agreement to convey the White Hart Inn, in Benson Com., Oxford, the defendant having acknowledged *by letter* an agreement for the sale thereof. The question was whether the letter took the case out of the statute; case makes no use whatever of any parol testimony to supply the terms of the contract *aliunde*. This case has been questioned by Lord Redesdale in *Clinan* v. *Croke*, 1 Scho. and Lefroy, 33, who says he never could bring his mind to agree to this decision, and that Lord Thurlow was diffident of the opinion when delivered.

In *Cripps* v. *Jee*, 4 Bro. C. C., 472, decided in 1793, the only parol testimony was that of the scrivener, who had omitted to prepare a conveyance as directed, to secure the grantee for advances, and as a trustee for the surplus, but had instead drafted an absolute conveyance. The master of the rolls in admitting the testimony, says that "the omission must be proven to be either by fraud or mistake, in order to introduce the parol evidence," and that there was such evidence *dehors* the deed.

Lewin on Trusts is quoted as an authority to support the proposition we contest.

He indeed makes use of the language quoted in the opinion, but simply to the point that the trust need only be manifested, not created by writing, but as to the point what the writing manifesting the trust should contain, his authority is directly against the proposition.

He says, page 64: "*Not only the fact of the trust, but also the terms of it, must be supported by evidence under signature.*"

O'Hara v. *O'Neill*, 7 Bro. Par. C., 227, reported in 1717.

This is the report:

"On the 20th of February, 1716, this cause was heard, when the Lord Chancellor declared that there appearing a trust sufficiently proven by letters of the defendant's handwriting, and subscribed by him, besides the implied trusts which might arise or result to the plaintiff from the surrender of his lease for three years, this case was clearly out of the statute made for the prevention of frauds and perjuries."

It seems to us the fair result of the cases cited by the court, is this:

Cripps v. *Jee*. The admission of parol testimony was put by

the court exclusively on the ground of an omission in the deed through *fraud* or *mistake*, of which there is no pretense here.

O'Hara v. *O'Neill*. The trust was sufficiently proven by letters, and no parol evidence whatever was used.

Forster v. *Hale*, and the text writers, Brown and Lewin, by no means ratify such doctrine, but do expressly insist that under the statute the *terms of the trust*, as well as its *existence*, must be manifested and proved by writing under the hand of the party.

In *Tawney* v. *Crowther*, questioned by Lord Redesdale, the terms of the contract which the court was asked to enforce were ruled to be sufficiently collected from a letter of the defendant.

When therefore, the authorities are gone into, it will be found that the construction of the statute of frauds which the opinion announced, cannot be authenticated by the citations, and if the court is resolved to stand by its own late determination in such a novel reading of the law, it is at least without support from these authorities on which it apparently relies.

With most respectful submission to the court, we conceive that to put such a reading upon the statute is also to do violence to its obvious letter and intent.

Being a statute to prevent frauds and perjuries, it would seem to be clear, that the perjury which might be committed in establishing by parol the terms and conditions of a trust, and the persons entitled and their respective interests, is as much within the reason and preventive scope of the statute as the perjury which might be used in establishing its existence only. The law designed to abolish all opportunity for either, and the construction asserted is therefore palpably destructive of its end and object.

And so the text of the statute does not run "no trust shall be valid, which is not *partly* manifested and proven in writing, etc.;" or, "*its existence, at least*, shall be manifested and proven in writing, etc.;" but "no trust shall be valid unless IT shall be manifested and proven in writing."

When it is reflected what are the ingredients essential to constitute a trust—a sufficient expression of its existence, an ascertained beneficiary, certainty as to the manner in which it is to be performed—it is difficult to argue that the statute is satisfied by a written manifestation of only one of the ingredients of a complete trust, and puts the other essentials to the hazard of parol.

Proving by writing, *simply* that a trust of some kind exists but is undefined by the paper, is not proving any trust whatever. No court could vitalize such a declaration. Adding to such a paper, by supplying the terms, subject-matter and beneficiaries by parol, and what results when a court of chancery undertakes to execute it by a decree? The particular trust enforced is not proven by writing at all. The essence of a trust are the beneficiaries and the terms and conditions, and these are manifested to the court through the dangerous and prohibited medium of oral testimony.

Confident that the court has been misled into a hasty approval of an unsupported and unsound construction of the statute of frauds, we desire to present a collection of authorities, so direct and indisputable, upon the points, that this court will not hesitate on re-examination to abandon a proposition which is demonstrably erroneous.

Beginning with the text-writers, we have heretofore shown that *Brown* and *Lewin* do not commit their judgments to the doctrine of the former opinion, but expressly condemn it.

A standard authority on the law of trusts, thus expresses himself:

"*The objects and nature of the trust must always appear from such writings* with sufficient certainty, and also their connection with the subject-matter of the trust. Indeed, courts require demonstration on the latter point, and the trust will not be executed if the precise nature of it and the particular persons who are to take as *cestui que trusts*, and the proportions in which they are to take cannot be ascertained. *When all the particulars properly appear from writings signed by the parties*, the trust will be executed.

Perry on T., 54, § 83.

Hilliard speaks to the same point:

"A trust cannot be established by parol evidence, even though this goes to confirm other written evidence in showing the title to land not to be in the supposed trustee."

"Such acknowledgment must show *not only the existence* but *the precise nature of the trust*."

1 Hilliard on R. P., 425.

"Therefore, if *the existence* of a trust *together with its precise terms* and *subject-matter*, *can be proved from any subsequent acknowledgment written and signed by the trustee*, as by a letter, memorandum, or recital in a deed, it is sufficient."

Adams' Eq., 28.

And the note to the text is:

"Any writing, no matter how informal, which *declares what the trust is*, will satisfy the requirements of the statute;" citing many authorities, English and American.

"The object of requiring a writing is not thereby to declare or create a trust, but to furnish the requsite, and only competent evidence of an existing fact, namely: that there is a trust and confidence in the trustee in respect to the estate in favor of another, and which but for the statute might be otherwise proved.

The evidence, however, should not only show that there is this trust, but what the trust is."

2 Wash., 467.

"It is sufficient under the statute *if the terms of the trust* can be duly ascertained *by the writing*."

4 Kent's Com., 305.

The statute requires that the trust "should be manifested and proved by writing, plainly meaning that there should be evidence in writing, proving that *there was a trust and what the trust was.*"

Greenl. on Ev., § 266, p. 304.

"Verbal testimony is inadmissible, the policy of the law being to prevent fraud and perjury by taking all the enumerated transactions entirely out of the reach of any verbal testimony whatever."

1 Greenl. Cruise, 356, note.

With varying language but striking unanimity these commentators all come to the one conclusion, that the trust to be valid must be proven by writings which *vi sua*, by force of their own contents, exhibit both the existence and the full nature and terms of the trust.

Precisely this construction of another section touching the requisites of the written memorandum necessary to take a contract for the sale of lands out of the statute, has been repeatedly enforced by this and other courts. The law will not tolerate that the evidence of the agreement shall lie partly in writing and partly in parol, but it must by force of its own contents exhibit the nature of the bargain.

Boys v. *Ayerst*, 6 Madd., 316, was an action for specific performance for sale of lands, evidenced by three letters, not containing, however, all the terms of the contract. The opinion runs:

"It is immaterial therefore, what the form of writing is which expresses the agreement, and a letter is as effectual for the purpose as a deed. It is immaterial too, what the form of the language is. *It is necessary only that the writing should evidence all the terms of the engagement by which the defendant consents to be bound, and which the court is called upon to execute.*"

And performance was denied.

"Every agreement which is required to be in writing by the statute of frauds *must be certain in itself* or capable of being made so by reference to something else, whereby the term can be ascertained with reasonable preciseness or it cannot be carried into effect. The rule is settled on the firmest basis," citing many authorities.

Abell v. *Radcliff*, 13 John, 296.

On the hearing of a bill in equity to enforce a contract for sale of lands where there was written evidence of a bargain but not the entire terms, the highest court of Massachusetts thus expresses its views of the statute.

"The memorandum does not, either in itself *or by reference to any other writing*, contain the means of describing or identifying the boundaries of the land to be conveyed. It was, therefore, clearly insufficient to take the case out of the statute of frauds. *Parol testimony of a previous oral agreement which is the only means*

of identification referred to in the memorandum, cannot be taken in consideration in order to complete it."

Wheelan v. *Sullivan*, 102 Mass., 206.

"*The written note must either by its own language or by reference to other paper, contain such a description of the contract as shall dispense with the necessity of resorting to paral evidence to supply anything essential to give it validity. Ergo*, it must state a stipulated price, although the letters introduced show the defendant over his own hand, acknowledged that he had bought the wool."

Ide v. *Stanton*, 15 Vt., 685.
Blagden v. *Bradbear*, 12., Ves 466.
Clarke v. *Wright*, 1 Atk., 12.
Bromley v. *Jeffreys*, 2 Vern., 415.
Elnun v. *Kingscote*, 5 B. & C., 583.

A letter from a purchaser to the vendor *alluding to a parol agreement* for the sale of goods, and enquiring whether they will be ready at the time agreed on, but not mentioning the quantity, quality or price of the goods, or the time of payment, is not a sufficient memorandum to take the case out of the statute of frauds.

Waterman v. *Meigs*, 4 Cush., 497.
Morton v. *Dean*, 13 Met., 385.

"It is a settled principle (citing many cases), that if the court cannot ascertain with reasonable certainty the terms of the agreement from the writing, or from some other papers to which it refers, the writing does not take the case out of the statute. *When agreement is thus defective it cannot be supplied by parol evidence, for that would be at once to open the door to perjury, and to introduce all the mischief which the statute of frauds and perjuries was intended to prevent.*"

Parkhurst v. *Van Cortland*, 1 John. Ch., 274.

This court in the case of *Doty* v. *Wilder*, 15 Ill., 407, in a discussion of the same section, and the essentials of the memorandum, decide that

An auctioneer's memorandum *must on its face, or in connection with some other writing, contain everything necessary to show the contract between the parties, so as to avoid a resort to parol proof.*

The reasoning and principle of the opinion last cited seem utterly irreconcilable with the views of the court in the previous appeal. Analyzing the two sections, can it be well asserted that the "memorandum" is required to be more explicit than "the manifestation and "proof of the trust;" that the latter can be helped by parol and the former not. If the recent conclusion of the court that it satisfies the law to prove the existence of a trust by writing and supply its terms *aliunde*, be a correct exposition of the statute, ought not the case of *Doty* v. *Wilder* to run thus:

"An auctioneer's memorandum must, on its face, show that the property was really bargained, but the terms of such bargain may be properly supplied by oral evidence."

We add a citation on still another portion of the same statute:

"The memorandum to pay the debt of another must show *the whole terms of the contract, and no resort can be had to parol evidence to add to them.*"

Hall v. *Soule*, 11 Mich., 496.

Passing now from the text-books and the decisions construing analogous selections of the same statute, we call the attention of the court to the adjudications on the precise point—what, under the statute of frauds, constitutes a sufficient manifestation of trust?

In an early case in New York, Chancellor KENT was called upon to determine the standard of sufficiency. He thus states the point mooted, and his opinion:

"Is there a trust sufficiently manifested in writing to be recognized and enforced in this court? *To take the case out of the statute of frauds the trust must appear in writing under the hand of the party to be charged with absolute certainty as to its nature and terms before the court can execute it.* A trust need not be created by writing, but it must be manifested and proved by writing, and the doctrine in *Foster* v. *Hale* (3 Vesey, 696,) *is that the trust and the terms and conditions of it must sufficiently appear so that the court may not be called upon to execute the trust in a manner different from that intended.*"

Steere v. *Steere*, 5 Johns' Ch., 1.

In the recent case of *Cook* v. *Barr*, 44 N. Y., 156, which was an action in chancery to enforce a trust in lands evidenced by the terms of an answer *aided by parol evidence*, it was ruled by an unanimous court:

"The deed and mortgage make no mention of the trust, and the only writing relied upon to prove it is this answer: *The parol evidence and the acts of the parties show clearly these alleged trusts, but these cannot be resorted to to help out the proof furnished by the writing. The writing must show that there is a trust, and what it is, and, failing in this, it is insufficient.*"

"Under the statute it is necessary to prove, by writing, the whole trust, not only that there was a trust, but what it was, otherwise the object of this statute, which was to prevent frauds and perjuries in the proof of trusts by parol declarations, would have been thwarted."

Also:

Dillaye v. *Greenough*, 45 N. Y., 438.

The remaining citation is *Smith* v. *Matthews*, ruled in the English court of chancery in 1860, and reported in 3 De G. F. & J., 139.

On an examination of the case itself, we think no one will be disposed to question either its applicability or conclusiveness.

The action was to fasten a trust upon certain realty, called the Dore lands, for the benefit of a Mrs. Matthews and her children.

There were three letters and a memorandum signed by the defendant, which were relied on to manifest the trust, assisted by the oral evidence as to its terms.

The case was exhaustively argued by such eminent counsel as Selwyn and Sir Roundell Palmer, and decided by Lord Justice Turner and Knight Bruce.

Palmer *arguendo* was insisting that to prove the mere existence of the trust, in writing, satisfied the law and let in parol evidence, when he was thus interrupted by Justice Turner: "*Have you any authority for the position that, when you have a writing showing that there is a trust, you may establish its terms by parol evidence?*"

A single authority was mentioned by counsel, bearing that way, which was afterwards denied by the court, but neither *Cripps* v. *Jee*, *Forster* v. *Hale*, *Tawney* v. *Crowther*, or *O'Hara* v. *O'Neil*, were alluded to, by either court or counsel, as authorities to sustain the right to call in oral evidence. If the most eminent equity judges, and the foremost man at the English bar ignore these cases as authority on the point, surely the courts of this country ought not to feel warranted in planting a decree upon them.

Sir R. Palmer, feeling the policy of the statute leaning heavily on his construction, urged that the danger of perjury would be removed, if the party, over his own hand, manifested that there was a trust, but was again interrupted by the inquiry from the bench: Do you not let in the danger of perjury as between the *cestui que trust?*

The opinion, after considering the statute itself, proceeds:

"The construction put by Lord Alvanley, in *Forster* v. *Hale*, has never been disputed. So far from being disposed to dissent from what Lord Alvanley said, I entirely agree in it, and think that he has put most reasonable, sound and just construction upon the section.

I take it, therefore, that when this court is called upon to establish or act upon a trust of land, by declaration or creation, it must not only be manifested and proved by writing, signed by the party by law enabled to declare the trust, that there is a trust, but it must also be proved by writing, signed as required, what that trust is."

Overborne by the weight of these concurrent authorities, ought the dangerous construction, placed upon the statute of frauds in the recent opinion, to stand upon the record as a precedent?

Would not the construction lately advanced by the court substantially extirpate the statute and reduce the establishment of trusts to that vague and hazardous state alluded to by Lord Nottingham:

"when a way was opened to the lord chancellor to construe or presume any man in England out of his estate?"

This doctrine that it is permissible by parol evidence to supply the terms of the trust, its subject-matter and beneficiaries, is absolutely indispensable to the maintenance of the decree of which we complain. It is the pivot on which the whole controversy turns. For as we understand the opinion, it is conceded that without the admission and aid of the conversations related by Buckner and Mrs. Kingsbury, the terms of the trust are not sufficiently established to authorize the court to execute it by a decree.

We think, on a careful analysis of the opinion, we can justly go further, and claim that the theory of the case urged by the solicitors, and stated by the court, require the assistance of the conversations to establish even the existence of any trust whatever. In other words, that the fact of a trust is collected not from the face or terms of the writings themselves, according to their ordinary import, but as admixed with the parol explanations imported into and made part of them.

The very first item in the case is the illegal testimony of Buckner testifying to the existence of a parol trust, and the subsequent letter and will were referred and adjusted to the conversations to which Buckner and Mrs. Kingsbury had previously deposed, precisely as though incompetent conversations were *competently established facts* which the court was authorized to consider in interpreting the meaning of subsequent papers. Necessarily this method of construction is referable to the admission and use of the testimony of Buckner, Burnside and Mrs. Kingsbury.

We have shown that their testimony is prohibited. Treating therefore, their evidence in the record without warrant of law, and not to be at all considered, we pray the judgment of the court on this proposition: Do the letter and the unattested will, by the natural force of their own language, "manifest and prove" the terms of the precise trust set forth in the cross-bill, or the existence of any trust whatever?

The letter says "that Simon had made over the Chicago property to me." The significance attached to the phrase "made over" results from linking the letter to the conversation and considering both together. Of itself it is not an unusual expression, and not at all indicative of a trust. According to both Webster and Worcester it is synonymous with "alienate," "transfer," "assign." "To make over" in conveyancing, means to transfer, alienate, put out of one's possession, according to Burrill.

2 Law Dict.

The very words "make over" have been by this court stated to be identical in legal import with "assign," "set over," and to import a fee.

Vash v. *Blake*, 38 Ill., 369.

If the statement in a letter, that property had been " made over " to the writer by some conveyance is entirely insufficient, according to ordinary meaning, to manifest and prove that the writer holds only in trust, when the next step is taken into account, and the particular conveyance alluded to in the letter is ascertained to be absolute on its face, without any trusts specified, and in consideration of natural love and affection, the writing not only does not manifest a trust but induces a strong presumption against one.

" A conveyance absolute in its terms and in consideration of natural love and affection, is repugnant to the existence of a trust."

Hill on T., 61 and cases in note.

Miller v. *Stokely*, 5 Ohio, S. 194.

Consider next the phrase in the letter that " a new power of attorney *is therefore necessary for you and myself*," and that the new power of attorney was actually executed and put into operation by the assumption and exercise of absolute ownership in the property " made over." Do such things manifest a trust, and that the person to whom property was so made over had it as a bare legal trustee *for the title only*, and without any rightful authority to go into possession and enjoy the rents and profits? Yet, such and none other, is the trust charged in the cross-bill and enforced by the decree. If the grantee was a naked trustee with no beneficial interest whatever, and with no right to claim the rents and profits, why was a new power of attorney " therefore necessary " ?

The creation of the new authority, the assumption of dominion over the property, the entry into possession, and the receipt of the rents and profits were *indicia* of absolute authority and are wholly irreconcilable with the idea of trusteeship.

And so we think that it cannot be fairly collected from the language of the letter, or the absolute conveyance to which it referred, or the new power of attorney, indicating a change of title and entire and real ownership which it enclosed, that a trust was manifested and proven.

Can any such result be gathered from the unattested will? The clause referring to Mrs. Buckner is not ear-marked as a declaration of trust, and set apart. It is the second of four subdivisions. They are all referable to the opening sentence of the will, which is this:

" I leave this as a record of my wishes respecting *the disposition of MY property*." What was designed to be conveyed to Mrs. Buckner by force of the paper was, therefore, a portion of " my property," all of which he was undertaking to make disposition of, by his specific legacies, to his mother, sister, cousin, and then " the " remainder of every description " to his wife, and each and all of the devises are to be subordinated and so carried out that his wife's yearly income shall never be less than $2,000. The clause to Mrs. Buckner stands in the will as a devisee; it purports to be a disposition of the testator's property; it is preceded by a devise, it is fol-

lowed by a devise, and it is absolutely necessary to read it as a devise to make sense of the residuary clause.

It is also to be observed that in each one of the subdivisions he prefixes the devise with precisely the same language:

To my mother, Jane C. Kingsbury, *I leave*—
To my sister, Mary K. Buckner, *I leave*—
To my cousin, John J. Kingsbury, *I leave*—

The remainder of my property of every description *I leave* to my devoted wife, Eva.

The first canon of construction requires that the words of a will are to be judged according to their strict and primary acceptation. The words, "To leave," necessarily imply a testamentary disposition of property; a grant by will; and this is a matter of express adjudication.

Doer v. *Thorley*, 10 East., 456.

If Henry W. Kingsbury did not own this property he could not "leave" it. The employment of the term, therefore, indicates ownership, and the lawful power of disposing of it by will, and excludes the idea of a mere trusteeship.

The phrase "*so much* of the Chicago property held in my name," etc., measures the *quantum* of interest, the amount of "my property" which "I leave" to my sister.

The clause on which reliance is made to repel the idea of ownership, and manifest and prove a trust, we find stated as the second item in the disposition of "my property"; it is preceded and followed by undoubted devises; it is couched in the technical language of a devise, and precisely like the others, "I leave to," and it is necessary to read it as a devise, to properly render the residuary clause.

If it can be read as a devise it is wholly impossible to construe it as a declaration of trust. The two are repugnant. One is the exercise of testamentary capacity, and the other the acknowledgment of the want of it. Now, had the paper in question been properly attested by two subscribing witnesses and the posthumous heir not been born, no possible objection could have been made to the validity of this clause of the will as a devise. It has the operative language of bequest; there is a devisee in being and an interest devised capable of easy ascertainment.

There is nothing obscure or ambiguous, and the language is explicit, and no evidence could be considered to show the testator *meant* something different from what he had declared.

When, therefore, Henry W. Kingsbury assumed the power of devising by will of property deeded to him, partly to his sister and the remainder to his wife, and employed the ordinary language of devise, it can scarcely be seriously claimed that his written act manifested and proved the existence of a trust for his sister in all such property.

The argument is, that not by chance, but designedly, the testator selected the phrase, "the Chicago property held in my name" in order to evidence the lack of real ownership, and sufficient in law to change what else would have been a devise, into a declaration of trust. The proposition immediately succeeding and touching the identical clause is that he was so young and inexperienced that he lacked the quite common information that dower was but a life estate.

If Henry W. Kingsbury was in truth but a mere naked trustee of the property set forth in conveyance to him, it is incomprehensible that he should have so juggled this business. He was a military man. He received the discipline of a thorough and methodical education at West Point. He would necessarily have dealt with his ownership as a blunt soldier and a man of honor, and not left anything to the hazard of misconstruction. He would have said explicitly and without disguise, "The property mentioned in the deed of May 15, 1861, is not mine. I am only a trustee to hold the title for my sister, Mary K. Buckner." If the facts were so, it required no familiarity with the law of dower or wills or trust, for the testator to have thus recorded them.

On the theory, however, that Buckner had been in the exclusive enjoyment of the common estate from 1856 to 1861; that he had received the income; that he had sold a portion of the inheritance, and was chargeable with the proceeds; that the estate had been mortgaged to over a $100,000, and that, from 1856 to 1861, young Kingsbury had received nothing whatever, and that in 1861 the income was inadequate to pay interest and taxes, and the property was in peril of being sold for default, it is not difficult to presume a valueable as well as a good consideration for the conveyance in question, and put the case on other ground than that of trust. On such a theory, the entire conduct of Henry W. Kingsbury is explicable, and especially his discriminating devise to Mrs. Buckner, of but a third. We contend the record, in its present shape, furnishes evidence on which the court can properly presume that this was in substance the nature of the transaction.

After this considerable lapse of time, with one party to the transaction dead, and the lips of the other sealed by the law, with no contemporaneous writings in explanation of the fact, it is not surprising that the infant heir should not be able to advance on the record a clear and entirely satisfactory explanation of every circumstance. Nor does the law require this at his hands, for, as a learned chancellor once observed: "The heir need not bring proofs to keep his estate, but the plaintiff must bring proofs to take it from him."

The phrase, Simon "has made over the Chicago property" to me, and the expression, "the Chicago property, held in my name," are scarcely enough. If the letter and will had been recorded, would this court deem them adequate, in and of themselves, to

charge those dealing with the property with notice that the apparent owner was not the real?

LAWRENCE, J., in the quite recent case of *Lantry* v. *Lantry*, 51 Ill., 458, where a trust in lands was sought to be proven, asserted the well established doctrine: "The rule is, even in that class of cases in which a trust can be established by parol, that such evidence is not regarded with favor, and the court will not act upon it if it be not strong and irrefragible, or if it be contradicted by other testimony." Other courts have expressed the rule to the same effect.

"The evidence must be certain and conclusive, so as to exclude every rational hypothesis to the contrary."

"The trust must be established so as to remove all reasonable and well founded doubt."

"The courts will look anxiously for corroborating circumstances, and there should be no delay in the *cestui que trust* advancing their cause."

Casting from this record the prohibited testimony of Buckner, Burnside and Mrs. Kingsbury, and does there remain "strong and irrefragible" testimony, within the phrase of the chief justice, to authorize the court to act? Has there been no suspicious laches?

Is the case or the evidence to be regarded with favor, when the pretended *cestui que trusts* have laid by certainly from 1865 (when the war closed and they were free to act), without, so far as the record shows, lifting a finger in assertion of a trust, involving the moiety of an estate constantly increasing in value?

Is the theory to be regarded with favor, that the conveyance was in reality executed under circumstances of such emergency that Buckner was specially summoned by telegraph from Frankfort to Louisville to sign and acknowledge it (Rec., 100—answer to interrogatory 9), and yet that the grantee was not cognizant of its existence until two months thereafter, and then only notified by a "casual remark," in a third or fourth interview? (Rec., 83.)

This court has said that a trust will not be enforced if the evidence is contradicted.

Were Mrs. Kingsbury's testimony, at all competent, it would be well to compare her recollection of a conversation held nine years previous, with the averments in her cause against this infant for the assignment of dower. In 1868, she brought suit for, and recovered dower upon *the allegation and proof* that this infant was the sole owner of this identical property, and that too by reason of the very deed in question. The law requires all parties in interest to be joined in such a proceeding. If this trust was a matter so undoubted and notorious in the family, why did not Mrs. Kingsbury make Mrs. Buckner a party defendant to her dower suit as the real and beneficial owner of an undivided half.

The Buckners were without doubt informed of this dower suit, its progress and its result. If they were the equitable owners of half the property involved, or had any interest, they had the un-

doubted right under the law to intervene and establish their equities. They knew of the existence and terms of the will now claimed to evidence the trust in their behalf. (Rec.,90.) And they had employed counsel touching the very matter. (Rec., 91.) Is it not incredible that they stood by, knowing the facts, and let such a litigation progress to a final decree, declaring the infant the owner of their property, and Mrs. Lawrence awarded dower in an estate never her husband's without making a single effort to prevent such a consummation.

Believing that the court will make disposition of this decree, by reason of the matters which we have previously discussed, we do not deem it essential to remark at any length upon the remaining errors of this record. The attention of the court will, however, be briefly directed to them.

VI. *The decree of November 13, 1871, is indefinite and erroneous as regards encumbrances.*

It orders (Rec., 153; Abst., 8), that a partition should be effected based on the quantity, quality and value of the premises, and the encumbrances thereupon.

The decree is utterly indefinite and uncertain to voidness. They are not identified in any manner, as to holder's amount, or the property on which they rest. No encumbrances were before the court, so that the decree could properly deal with such questions, and there were no allegations in the cross-bill as to existence, or amount of any such encumbrance so as to present an issue to enable the court to render any decree, and the certificate of evidence shows there were neither mortgages, judgments, nor any other encumbrances introduced in evidence. The partition decreed therefore rests on this unknown quantity. The consideration of an indefinite amount of liens, not pleaded, not in issue, of which no evidence was adduced, and not ascertained by the decree. It is of the essence of a decree in chancery that it should be certain and specific, otherwise it must be reversed.

Wernag v. *Brown*, 3 Blackf., 458.
Lawrence v. *Fast*, 20 Ill., 338.
Young v. *Thompson*, 14 Ill., 381.
Frye v. *Bank of Ill.*, 5 Gilm., 338.
Aldrich v. *Sharp*, 3 Scam., 261.
Smith v. *Trimble*, 27 Ill., 152.

This decree directing a partition, taking into account "encumbrances," without decreeing their amount or subject-matter, was impossible of execution.

There was no allegation or prayer in the cross-bill to authorize any decree to partition the property, taking any encumbrances

whatever into account. In that regard the decree is unwarranted by the allegations, and exceeded the prayer of the bill.

Waugh v. *Robbins*, 33 Ill., 182.
Wilhite v. *Pearce*, 47 Ill., 415.
McCagg v. *Heacock*, 42 Ill., 153.
Minnesota Co. v. *Chamberlain*, 3 Wall., 704.
Forquer v. *Forquer*, 21 Ill., 294.
Thompson v. *Morris*, 2 Chi. Leg. News, p. 210.
Ohling v. *Luitjens*, 32 Ill., 23.
McKay v. *Bissett*, 5 Gilm., 499.

Even if the cross-bill had contained proper allegations as to the existence of encumbrances, there is no legal proof preserved in the record that there were any encumbrances whatever on the property, nor is it so found in the reciting portion of the decree.

Whilhite v. *Pearce*, 47 Ill., 413.
Waugh v. *Robbins*, 33 Ill., 181.
Tibbs v. *Allen*, 37 Ill., 129.
Kilgour v. *Crawford*, 51 Ill., 250.
Pankey, Admr. v. *Baum*, 51 Ill., 88.

The court had no jurisdiction to decree as to encumbrances without the presence of the lien holders on the record. They are parties in interest in the property, within the meaning of the act touching partitions and must be before the court before the *quantum* of their interest can be decreed in any manner.

Bingham v. *Galloway*, 13 Ill., 68.
Loomis v. *Riley*, 24 Ill., 307.
Marshall v. *Beverly*, 4 Peters, 660.
Seagrave v. *Edwards*, 3 Vesey, 372.
Kester v. *Stark*, 19 Ill., 328.

The infant, unquestionably, has the right to have all the encumbrances before the court, that they may be concluded by the same decree which purports to bind him, and so have the question of their interests settled in the one litigation, and thereby make the decree finally effectual as to every interest.

McDaniel v. *Bissel*, 19 Ill., 225.
Broker v. *Deveraux*, 8 Paige, 512.
Payne v. *Hook*, 7 Wallace, 425.
Story v. *Livingstone*, 13 Peters, 375.

Non constat that the assumed encumbrances, in consideration of which a partition is founded, are the true ones. The holders are not concluded, and therefore nothing can be said to be established. Is that approval practice, in any case, more especially where an infant is concerned?

VII. *The report of the commissioners in partition was illegal, and the court had no authority to receive or act upon it.*

The decree appointing them, furnishes the grant and limitations of their authority. It empowers and requires them to take "the oath required by law, make the partition, and *report in the manner directed by the statutes.*"

That decree was enrolled on November 13, 1871. The law requires the commissioners in partition to report at the same term of court during which they are appointed, or the succeeding one, (Gross Stat. p. 474, § 9).

The statute is explicit and peremptory. It is a limitation on the power of the commissioners which the Circuit court was not at liberty to disregard. The case comes within the ordinary principle that a naked statutory power must be strictly pursued, and that when the law plainly limits the time within which an official act shall be performed, it cannot legally be done thereafter.

Tibbs v. *Allen*, 24 Ill., 120.
Hickenbotham v. *Blackledger*, 54 Ill., 231.
McLaughlin v. *Thompson*, 55 Ill., 249.
Ewing v. *Bailey*, 1 Scam., 421.
Turney v. *Turney*, 24 Ill., 625.
Reynolds v. *Wilson*, 15 Ill., 394.

The report of the commissioners was not made at the November term, when they received their appointment, nor at the December term. The report was made on January 22d, at the January term, 1872, when the decree did not authorize it and the statute forbade it. The authority of the commissioners, by the plain language of the law, did not survive the December term. Any act done or report made after that statutory limit is not an official act; it is not a legal act and cannot be noticed by the court. Failing to report within the time required by law there should have been a new appointment and oath. A decree of partition based on the void report of commissioners whose authority had lapsed, has but a slender foundation.

The pretended report of the commissioners is likewise illegal, because they proceeded to erect themselves into a judicial body and exercise judicial functions, contrary to law.

We have before seen that the decree is wholly indefinite as to the encumbrances which the commissioners are to take into account in dividing the property.

It will be observed that the commissioners proceed gravely to supplement that defect in the decree by undertaking to make certain the encumbrances with which they had to deal. Accordingly they report (Rec., 157) that "they find the following encumbrances on the real estate and premises described in said decree, and they

have divided and allotted them as hereinafter stated, to wit:" stating nine encumbrances aggregating $150,000, which they decree to be existing and to be paid by the infant and Mrs. Buckner.

And they further proceed to find and report that the interest has been paid except some arrearages, and in making the partition they have only considered the principal sums due, etc.

Such a partition cannot stand.

In what nook or corner of the statute or decree can warrant be found for such a proceeding? To ascertain the existence, validity and amount of encumbrances is a judicial act. It is determining the rights and interests of the parties, and this only the court can do.

Hickenbotham v. *Blackledge*, 54 Ill., 318.
Gross Stat., p. 475, § 15.
Hall v. *Marks*, 34 Ill., 360.
Hughes v. *Streetor*, 24 Ill., 649.
Wilhite v. *Pearce*, 47 Ill., 413.

By the decree appointing them the commissioners were directed to partition the land, not to ascertain or allott any encumbrances. Even without the constitutional prohibition there is an entire want of authority to do the acts on which they base the partition.

Shower v. *Lynn*, 2 Howard, 43.
Brignardello v. *Gray*, 1 Wallace, 627.
Corwith v. *Griffing*, 21 Barb., 9.
Farzier v. *Pankey*, 1 Swan. (Tenn.), 95.
Hickenbotham v. *Blackledge*, *supra*.

The commissioners took no oath either to ascertain or apportion any encumbrances.

They report they "find" certain encumbrances.

How do they "find" such facts? Presumably on proof.

But there is no proof preserved in the record to support any such finding, or to show that any encumbrances whatever exist upon the property.

The commissioners were directed by the decree to make partition of the Kingsbury tract lying south of the center of Ontario street, and east of the north branch of the Chicago river. (Rec., 153.)

They proceeded to make partition of the property lying south of a line *three feet north* of the center of Ontario street, and property rights running to the *west bank* of the north branch.

The decree itself establishes a trust in the entire Kingsbury tract of thirty-five acres, running north to Sedgwick's addition, according to the deed from Kinzie. It directs a conveyance by the master of an undivided half of all that tract, and then partition is only decreed of *a portion of the premises so conveyed by the master* running

north only to Ontario street. (Rec., 153.) And then the commissioners proceed to divide still another area, different both from the decree of trust or the order of partition. (Rec., 155.) If the partition exceeded the authority vested by the decree, it is a nullity.

VIII. *The decree of the Circuit Court, receiving and acting upon the illegal report of the commissioners, was void.*

If we are correct in the proposition immediately preceding, this follows necessarily. It is obvious error to act upon an illegal report. The report of the commissioners presented without authority of law at the January term, basing partition on facts found by usurped judicial action, and without proof in the record to support any such finding; alotting unproven liens and dividing different property from that which they were directed to partition, connot sustain any final decree of partition, and it was error for the court to receive it and decree partition and allot encumbrances upon the faith thereof; or decree that the infant should pay $75,000 of debt without any allegation or prayer in the cross-bill or proof in the record to authorize such a decree.

IX. *The court erred in directing the receiver in another cause to report in this cause, and in ordering such receiver to pay out funds in his hands to Mrs. Buckner.*

John Woodbridge was a receiver holding the entire property decreed by the court to belong to the infant in the dower suit brought by Jane C. Kingsbury. It is a practice without precedent or reason to support it, to move and manage a receiver as to his official acts in any other manner than by decrees and orders in the identical cause in which he is appointed. His receivership was not perambulatory. It was not possible for Mrs. Beckner, in accordance with sound equity practice,to undertake to exercise control over a cause to which she was not a party, by procuring the court on her motion in this cause, and on *ex parte* affidavits, to first order the receiver in a different litigation to report, and then to pay over trust moneys to her in consequence of his report.

The position that the receiver had somehow abdicated his trust as to half the property, immediately succeeding the announcement of the former opinion of this court, and became by treaty Mrs. Buckner's agent, is without strength. Such an act would be illegal. He stood undischarged of his trust until the order of the court discharged him. As the court's hand he still held all the property. All insurance policies were in his name, and he had collected and was collecting the moneys thereon solely as empowered by the court sitting in another cause. When he files his account current in the

cause in which his appointment was made, he can produce as his only voucher for the disbursement of $25,000 to Mrs. Buckner, a decretal order in this cause, ordering a disbursement in another.

This was not only irregular, considered as a matter of practice, but the particular decretal order is inequitable and erroneous.

The receiver, it appears, acting under the orders of court made in the dower suit, had bought a building on lot 5, on the falling in of a lease, that he had contracted a debt therefor, and had executed a note as receiver under the orders of the court. That building was destroyed by fire in October, 1871. The receiver had in hand about $49,000 of moneys, collected from insurance policies resting partly on the very building for which the fund was in debt for the purchase. Mrs. Buckner asked and procured an order requiring the receiver to pay her the full gross half of all the insurance money without any deduction whatever for the receiver's indebtedness of $25,000 which bought the very house on which many of the policies rested.

The other half of the insurance moneys is of course exhausted in the payment of the liabilities of the fund incurred under the order of the court and the infant gets nothing. Under that order Mrs. Buckner has received about $25,000, and out of the entire insurance fund the appellant has not received a penny.

X. *It was error for the court below to overrule the special exceptions, and decree a partition of the property alluded to as the Spencer mortgage tract.*

The facts disclosed by the record, and on which we rely in this connection, are these:

Julius J. B. Kingsbury and Buckner executed a deed of trust on this property, to Corydon Beckwith, to secure an indebtedness of $8,000 to Joseph Spencer. The deed contained a power of sale on ten days' notice. It appears that when Buckner was in the control and management of the estate, he suffered default to occur in the payment of interest. That default continued when the property was deeded to Henry W. Kingsbury, and until April 21, 1862, when the trustee, in consequence of such default, made sale of the property, in accordance with the power, to Miss Emily Spencer, of Hartford Conn., and executed a deed conveying to her the legal title. She went into possession of the property, and the receipts of the rents and profits, and so continued until in 1864, when, in consequence of the solicitations of Mr. Latrobe, she conveyed the property to Thomas Swann, in trust, to repay himself $10,000, which he had advanced to the boy to buy the property back, and, that being paid, on the further trust, to then convey the property to the infant, and, in the meanwhile, to allow the guardian of the boy to receive and enjoy the rents and profits.

The title papers, or full abstracts, are set forth in the certificate of evidence.

The court, on these facts, decreed partition of this tract, which action we assign for error.

It will be noted, with reference to this particular tract of land, that when Henry W. Kingsbury died, in September, 1862, he was not its owner, nor did he have any interest, or expectancy, or right of redemption therein. Whatever the state of the equities, or the existence of a trust for Mrs. Buckner as to the half of the remaining portion of the estate, the sale under the paramount title, and for a default dating back to 1860, extinguished title and trust together, and vested a new and perfect title in Miss Spencer. When the infant was born, he did not inherit this property, burdened with a trust, or in any other manner. As to all the other property, the law of descent cast on him the legal estate. To this he had neither legal or equitable title, and his present equitable rights in it do not come from or through his late father at all, but were created solely by contract with, and purchase from the holder of a perfect title.

The purchase from Miss Spencer was not a redemption, for no one had any right of redemption.

Purdy v. *McHenry*, 13 Ill., 231.

No condition of trust existed between Mrs. Buckner and the infant, as to this portion of the property at least, and he was at liberty to negotiate for it, and no trust arose, either from the purchase or the reception of the equitable title.

The doctrine of equity forbidding trustees to acquire the title to trust property, or make any contract touching the same, is not applicable. This tract was not trust property. The infant was under no obligation to any one whatever concerning it.

And it is to be noted that constructive trustees may, in absence of notice of the trust, purchase even the real estate and hold it discharged.

Giddings v. *Eastman*, 3 Paige, 561.

The equities arising on the conveyance from Miss Spencer are identical, it seems to us, with the case of

1 Hoff. Ch., 192.

Rogers v. *Simmons*, 55 Ill., 76.

In the latter case a guardian of heirs purchased property which had once belonged to the father of his wards, on the representation that it was being procured for their benefit, but it was ruled that no trust arose on the purchase which equity could enforce.

This difficulty also suggests itself. On the present structure of the cross-bill, can relief be had and partition decreed as to this trust?

It is not enforcing the same trust on which the other relief has been decreed.

Thomas Swann is not a party. Can the validity and effect of the trust deed he holds be tried in his absence? Can a decree be enrolled in substance annulling that conveyance unless he is a party to the suit?

It is established beyond question that Thomas Swann is the legal owner of this tract, and it is not competent to partition property when the holder of the legal title is not before the court. There is an entire absence of jurisdiction.

Williams v. *Wiggand*, 53 Ill., 233.
Schreider v. *Seibert*, 50 Ill., 288.
Kester v. *Stark*, 19 Ill., 328.
Hickenbotham v. *Blackledge*, 54 Ill., 318.

A decree undertaking to vest the legal title to this tract of land in the appellant and Mrs. Buckner, when it is undeniable on the proof in the record that the legal seizin is in Thomas Swann, is beyond the power of the court to enter.

XI. *It was error to decree costs against the defendant.*

It was not so ordered in the former opinion, and we apprehend it is not correct practice to award costs against infant defendants in chancery. Their case is exceptional.

Waring v. *Crane*, 2 *Paige*, 79.
Hill on Trust, 429.
Story Eq. Pl., § 59.

He cannot be charged with any default or laches in failing to acknowledge or execute such a constructive trusteeship, even if one existed, for he had no capacity to do either, and costs in chancery are imposed by way of penalty for refusal to do equity without suit.

It has even been ruled by as high authorities as Lord Eldon, that it is error to decree for an account against an infant for receipts during minority.

Hindmarsh v. *Southgate*, 3 Russell, 324.
Camn v. *Mowatt*, 2 Edw., Ch. 60.

We ask that this decree shall not be permitted to evade the gripe of justice, because a former opinion had been surprised out of the court on illegal testimony, undue practice, and on a surcharged record. This tribunal has full possession of the cause, and can administer the same relief which the infant undoubtedly could secure in a bill to impeach the decree for the manifold errors and frauds upon him in the record.

We submit that the decree of November 13, 1871, and all proceedings subsequent thereto, should be reversed, and the cause remanded for a new trial, to the end that the illegal testimony of the

adverse parties to the record may be stricken out, and the infant may have his fair opportunity to advance testimony, to give his version and explanation of this business, and to defend his inheritance on all the grounds which equity and the facts do warrant.

Is this court persuaded that full and substantial justice has been done on a hearing of but one side of the controversy. Is that a well-attested method adopted by equity to arrive at an understanding of the whole truth? The cause of this infant was substantially rendered inarticulate by the feigned hearing and decree of December, 1870, and we now pray the court to unloose those bonds of silence and give him opportunity to be fully heard.

HENRY W. KINGSBURY,
By ANSON SPERRY,
Guardian ad Litem.

HENRY CRAWFORD,
Solicitor.

Supreme Court of Illinois.

NORTHERN GRAND DIVISION.

SEPTEMBER TERM, A. D. 1872.

HENRY W. KINGSBURY,

By Anson Sperry, Guardian ad litem,

vs.

MARY K. BUCKNER,
SIMON B. BUCKNER, AND
JANE C. KINGSBURY.

Appeal from Cook.

Filed ..... *day of*
.....A. D. 1872.

.....
Clerk.

HENRY CRAWFORD,
Solicitor.

NORTHERN DISTRICT OF ILLINOIS. | ss. I, William H. Bradley, clerk of the Circuit court of the United States, for said Northern district of Illinois, do hereby certity the above and foregoing to be a true and correct copy of Exhibit "D" filed in said court on the 18th day of May, A. D. 1878, in the cause wherein Henry W. Kingsbury is the complainant, and Simon B. Buckner *et al.* are the defendants, as the same appears from the original thereof now remaining in my custody and control.

[Seal of the Circuit Court, U. S., Northern Dist., Illinois, 1855.]

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district Northern division, the 26th day of November, A. D. 1889.

WILLIAM H. BRADLEY,
Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1889.

No. 176.

HENRY W. KINGSBURY, *Appellant*,

vs.

SIMON B. BUCKNER ET AL., *Appellees.*

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

BRIEF FOR APPELLANT.

JOHN P. WILSON,
ATTORNEY FOR APPELLANT.

BARNARD & GUNTHORP, LAW PRINTERS, CHICAGO.

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Appeal from Circuit Court of the United States for the Northern District of Illinois.

STATEMENT OF FACTS.

This appeal is prosecuted to reverse a decree dismissing for want of equity a bill filed on behalf of appellant by his guardian, to set aside a decree rendered against him in the Circuit court of Cook county, in the State of Illinois, by which he was deprived of a large portion of the estate which he inherited as heir of his father, upon the ground that the same was held by his father in trust for Simon B. Buckner and his wife. The bill so dismissed sought to impeach said decree for the reasons that said decree was procured by collusion with appellant's *guardian ad litem;* that the court entering said decree was without jurisdiction, and that the decree was erroneous, as shown by the record of the proceedings upon which the same was entered.

Julius J. B. Kingsbury, an officer in the army of the United States, and the grandfather of appellant, died in June, 1856, intestate, owning a large amount of real estate in the city of Chicago, leaving him surviving his widow, Jane C. Kingsbury, and his two children, Mary J. Buckner, the wife of Simon B. Buckner, and Henry W. Kingsbury, father of appellant, his only heirs at law. At the time of the death of said Kingsbury, and for some time prior thereto, Simon B. Buckner, his son-in-law, was residing in Chicago, and was acting as his agent in the general management of his Chicago property. Buckner continued to live in Chicago until 1857, when he removed to Kentucky, where he had formerly resided, and about the same time an arrangement was made with Ambrose E. Burnside to take charge of the Chicago property under his direction, which arrangement continued in force until the 15th day of May, 1861. On the 15th day of May, 1861, Simon B. Buckner and Mary K. Buckner, his wife, executed and acknowledged the following deed:

"Be it known that Simon B. Buckner and Mary K. "Buckner, his wife, of the city of Louisville and State "of Kentucky, in consideration of the sum of one dollar "in hand paid and the natural love and affection we bear "to our brother, Henry W. Kingsbury, do hereby grant, "bargain, sell and convey to said Henry W. Kingsbury, "of the United States Army, his heirs and assigns for-"ever, the following property, viz:

"One undivided half of lots number five (5) and six "(6), in block number thirty-five (35), in the original "town of Chicago, in the county of Cook and State of "Illinois, and also all of our right, title and interest in the "Kingsbury tract, so-called, being the tract of thirty-five

"acres, more or less, purchased from James Kinzie by the "late Major Julius J. B. Kingsbury, of the U. S. "Army, as per deed of said Kinzie, on record in the "clerk's office of Cook county, Illinois; the said tract "being the south half of what remained of the north-west "quarter of section nine, in township thirty-nine, range "fourteen, in said Cook county, Illinois, after deducting "therefrom the town of Waubansia. The other interest "in said land and tenements, etc., included in this deed, "now belongs to said Henry W. Kingsbury, as one of the "heirs of the late Major J. J. B. Kingsbury, and the en- "tire property being subject to the dower interest of *his* "Jane C. Kingsbury.

"To have and to hold the same to the said grantee, "his heirs and assigns forever, the grantors covenanting "that they will warrant the property hereby conveyed.

"In witness whereof we have hereunto set our hands "and seals at Louisville, this fifteenth day of May, "1861." (Rec., 103.)

Said deed was sent to Chicago by a messenger, with a letter to D. W. Mitchell, the agent in Chicago who had charge of the collection of the rents of the property, which letter directed Mitchell to place the deed on record "and to report all further collections and business to Gen. "Burnside; that he (Buckner), didn't wish to be consulted "in the matter any further." (Rec, 162–164.) The deed was placed on record, and thereafter all surplus rents collected were sent to Gen. Burnside, and neither Buckner nor his wife were consulted in regard to the management of the property, nor any of the rents accounted for to them until after the entry of the decree now sought to be set aside, which was rendered in 1872. The said deed was executed and re-

corded without the knowledge of Henry W. Kingsbury, the grantee therein named, and without any agreement or understanding in relation thereto, between the grantors and the grantees therein named. (Rec., 112.) In the early part of July, 1861, Kingsbury was notified that the property had been deeded to him, and he remarked "that was all right, or very well." (Rec., 113.) On the 23d of October, 1861, Kingsbury, appellant's father, wrote a letter to his mother, who had a right of dower in the property, saying:

"I spent all the morning with Burnside yesterday. "He states, as I told you, that Simon had made over all "the Chicago property that was held in his name to me. "A new power of attorney is therefore necessary from "you and myself. We made one out. I signed it. Burn- "side will send it to you. I send you a copy for your "own keeping and keep one for myself." (Rec., 147.)

Under the power of attorney, a copy of which will be found at page 88 of the record, Gen. Burnside took charge of the Chicago property, and continued in charge of the same until the death of Henry W. Kingsbury. Henry W. Kingsbury was an officer in the United States army, and was killed at the battle of Antietam, in September, 1862, leaving a widow, and subsequent to his death appellant was born, and was his only heir at law. Before his death said Kingsbury wrote and signed the following document:

"Expecting soon to start upon a military expedition "where death may overtake me, I leave this as a record "of my wishes respecting the disposition of my prop- "erty.

"To my mother, Jane C. Kingsbury, I leave twenty

"thousand dollars, or so much of my Chicago property "as upon fair appraisal may be valued at that amount.

"To my sister, Mary Jane Buckner, I leave so much "of the Chicago property held in my name as shall "amount to one-third of the property in the city of Chi- "cago, Illinois, left by my father, Julius J. B. Kingsbury, "deceased.

"To my cousin, John J. D. Kingsbury, I leave my "property in Waterbury, Connecticut, and, in addition "thereto, five thousand dollars, which I trust he will ex- "pend in completing his education.

"The remainder of my property of every description "I leave to my devoted wife, Eva.

"I desire, moreover, that the provisions of my will "may be so carried out that the yearly income of my "wife, for her own personal support, shall never be less "than two thousand dollars ($2,000.)

"As executors I name General Ambrose E. Burnside, "of Rhode Island, and Captain John Taylor, Com. "Dept., U. S. Army.

"Signed at Fortress Monroe, Va., March 25th, 1862.

"HENRY W. KINGSBURY,

"*1st Lieutenant, 5th Reg't. Artillery, U. S. Army.*"

(Rec., 92.)

On the 16th day of September, 1861, Simon B. Buckner entered the Confederate army in Nashville, Tennessee, and remained in that service until the close of the war in 1865, and held successively the positions of Brigadier General, Major General, and Lieutenant General, under commissions issued under the authority of the President of the Confederate States.

The will signed by Henry W. Kingsbury was not executed in such a manner as to be a valid will under the

laws of Illinois for the disposition of real estate, and no provision being made therein for his son, under the laws of Illinois, it would in no event affect the interest in his estate which in the absence of the will would descend to his son as his heir. No claim of any kind was made to the Chicago property by Simon B. Buckner or his wife until May, 1870. On the 9th day of May, the said will of Henry W. Kingsbury was admitted to probate in Virginia. (Rec., 93.) On the 11th day of July, 1870, an authenticated copy of said will of said Kingsbury, and the probate thereof in Virginia, was presented to the County court of Cook county, and an order entered that said will and the proof thereof should be treated and considered as available in law in like manner as wills executed in the State of Illinois. On the 18th day of July, 1870, Corydon Beckwith, as the next friend of the appellant, who was then under eight years of age and residing at Newport, in the state of Rhode Island, filed a bill in the Circuit court of Cook county, alleging ownership of the Chicago property by appellant as heir of his father, subject to the dower right of his mother and his grandmother; the making of said alleged will by appellant's father and the probate thereof as above stated and alleging that said will was a cloud upon appellant's title, and that the same was not a good will for the purpose of passing the title to real estate in the State of Illinois, and that even if the same was valid appellant would be entitled to receive out of the estate of his father the same as if he had died intestate, and that, being the sole and only heir of his father, that he inherited the whole of his fathers estate, subject to the dower of his mother, and praying that said will might be declared null and void as constituting a cloud upon appellant's title, and that the

Buckners might be enjoined from asserting any interest in his estate under or by virtue of said will. On October 31, 1870, Simon B. Buckner and Mary K. Buckner filed their answer to said bill, and on the same day filed their cross-bill against appellant and others, in and by which said answer and cross-bill the said Buckner and wife alleged that the deed herein mentioned of the 15th of May "was made without any consideration, contract, arrangement, bargain or promise whatever, and while the "said Henry W. Kingsbury was ignorant thereof, and "the deed was made under the circumstances herein set "forth, the sole purpose of your orators in executing the "same was to vest the title of the property described in "said deed in trust, and there was no purpose whatever "on the part of either of your orators to make a gift of "said property, or any part thereof, to the said Henry W. "Kingsbury, or to grant the same to him except as a naked "trust without any beneficial interest, and your orators, "advised by counsel, claim that by the rules of equity a "trust created by implication of law or a resulting trust, "arose for the use and benefit of your orators to the ex-"tent and according to their respective interests in the title "when such deed was made." (Rec., 67.) On the 25th of November, 1870, Corydon Beckwith was appointed guardian *ad litem* of appellant, on the motion of the complainants in the cross-bill, and on the 2d day of December said guardian *ad litem* filed the answer of appellant to said cross-bill. No process or notice of the filing of said cross-bill was served upon said minor, who at the date of the filing thereof, resided in the State of Rhode Island. The complainants in the cross-bill took the deposition of several witnesses in support of their said cross-bill, the last deposition taken being that of John Woodbridge,

which was taken on the 28th day of December, 1870. (Rec., 173.) After the taking of said deposition on the 28th day of December, 1870, and on or before the 31st day of December, an order was entered *nunc pro tunc* as of the 24th of December, dismissing both the original and the cross-bills. An appeal was prayed by the complainants in the original and cross-bills, and by agreement of parties appeal bonds were waived and the appeals taken to the Supreme court of Illinois, in the Central grand division instead of the Northern grand division, which includes Cook county, where the decree was rendered. No evidence whatever was taken on behalf of the minor upon the issues formed under the cross-bill, and no cross-interrogatory was propounded by his guardian *ad litem* to any witness whose deposition was taken in support of the cross-bill. In the absence of an agreement, under the statutes of the State of Illinois the case could not have been heard in the Circuit court until the January term, commencing on the 3d Monday in January, and in the absence of an agreement the appeal from the Circuit Court would have been heard in the Supreme court, sitting in the Northern grand division, the next term of which was held in September, 1871. The order was entered *nunc pro tunc* as of the 24th of December, as it was necessary even under agreement of parties that the decree should be entered ten days before the first day of the term of the Supreme court at which the appeal was heard. The first day of the January term, 1871, of the Supreme court in the Central grand division was the third day of January. The transcript of the record was filed on the 4th day of January and under the rules of practice then in force in the Supreme court of Illinois, all the cases at said term were tried within

three weeks of the first day of the term. The result of this proceeding was that the case was submitted to the Supreme court on final hearing within three weeks of the taking of the depositions in support of the cross-bill, without any evidence having been taken on behalf of appellant and without any notice in fact ever having been given to him of the filing of said cross-bill. The Supreme court upon the case as submitted to it, reversed the order of the Circuit court dismissing the cross-bill, and directed the entering of a decree finding that the property conveyed by the deed from Buckner and wife to Kingsbury was held in trust by Kingsbury, and that the same should be reconveyed, and that a partition of the property should be made in accordance with the rights of the respective parties. No petition for a rehearing was filed on behalf of the appellant, and the Circuit court entered the decree in pursuance of the order of the Supreme court. An appeal was taken from the decree so entered to the Supreme court and on the hearing in such appeal the Supreme court held that the only question was whether the Circuit court had erred in entering said decree, and held that there was no error as the Circuit court had merely followed the directions given by the Supreme court, and that the correctness of such directions could not be called in question in an appeal from a decree entered in pursuance of the mandate of the Supreme court. A motion was also made in the Supreme court to vacate its original judgment, but this motion was denied. The term having elapsed, the Supreme court had no jurisdiction over its former judgment. An original bill was then filed by the guardian of the minor in the Circuit court of Cook county, to set aside the decree of the Circuit court en-

tered upon said cross-bill upon the grounds of error, want of jurisdiction and fraud and collusion. A plea was filed setting up the former proceedings as a bar, in connection with an answer denying fraud and collusion in said proceedings. Upon the hearing the Circuit court sustained the plea and answer, and dismissed appellant's bill. From the order so entered appellant perfected his appeal within two years after attaining his majority.

Assignment of Errors.

1. The Circuit court erred in finding the issues for the defendants, Simon B. Buckner and Ambrose E. Burnside, upon the plea filed by them.

2. The Circuit court erred in finding that no replication had been filed to the answer of Simon B. Buckner and Ambrose E. Burnside.

3. The court erred in decreeing that the bill should be dismissed for want of equity.

4. The court erred in not entering a decree in accordance with the prayer of complainant's bill.

5. The court erred in severally sustaining the demurrers of Corydon Beckwith and of Jane C. Kingsbury.

ARGUMENT.

I.

IN THE STATE OF ILLINOIS A DECREE AGAINST A MINOR IS SUBJECT TO ATTACK BY AN ORIGINAL BILL FOR FRAUD, ERROR OR WANT OF JURISDICTION UNTIL FIVE YEARS AFTER THE MINOR ARRIVES AT LAWFUL AGE.

In the case of *Loyd* v. *Malone et al.*, 23 Ill., 43, the Supreme court of Illinois reviewed the authorities upon the question of the right of a minor to set aside a decree against him by original bill. The bill in that case was filed to set aside a decree of partition and sale of land owned by minors. The bill charged the proceedings were collusive, and also that the decree was erroneous, because no necessity existed for converting the land of the infants into money. The jurisdiction of the court entering the decree was not questioned. The court say:

"On the argument we had doubt, and much of it was "directed to this point, if an original bill could be filed "like this, attacking the order of partition and sale, and "a decree had, to set aside. We have examined the "question fully, and are well satisfied the bill can be "maintained. In the case of *Richmond and wife* v. *Tay-*"*leur*, 1 P. Wms., 734, Lord Chancellor Macclesfield "held, that where an infant conceives himself aggrieved "by a decree, he is not under necessity to stay till he be-"comes of age before he seeks redress, but may apply "for that purpose as soon as he thinks fit; neither is he "bound to proceed by way of rehearing or bill of review, "but may impeach the former decree by an original bill,

" in which it will be enough for him to say the decree " was obtained by fraud and collusion, or that no day was " given him to show cause against it; and Mr. Cotting- " ham, his lordship's secretary, acquainted the court that " Mr. Vernon, in case of an erroneous decree against an " infant, used always to advise the bringing of an original " bill to set it aside, but in such bill to allege specially the " errors in the former decree.

" To the same effect is the case of *Loyd* v. *Munsell*, 2 " *ib.*, 73, and *Sheldon* v. *Fortescue*, 3 *ib.*, 110, although " these cases allowed it on the ground of fraud. So in " *Robinson* v. *Robinson*, 2 Vesey, 232, Lord Chancellor " Hardwicke, on a bill of revivor by the present plaintiff " to revive the former decree and have the benefit thereof, " said, they could not controvert the decree; that there " have been cases of bills in nature of revivor, to carry " on a former decree, when the court sometimes, though " but seldom, have said, the defendant may dispute that " decree, but never that the plaintiff might. The decree " has determined the question, whether it was then de- " bated or not; and the court was thereby bound, though " *the plaintiff, being an infant, was not.* The cause, there- " fore, stood over, with liberty to the plaintiff to bring " an original bill, or take such method to bring his rights " in question as he shall be advised.

" So in Mitford's Pleadings, 113, it is said, where an " improper decree has been made against an infant, without " actual fraud, it ought to be impeached by original bill.

" In New York (*Davone* v. *Fanning*, 4 Johns. Ch., 199, " and *Murray* v. *Murray*, 5 *ib.* 60), and in Kentucky, " *Williams* v. *Fowler*, 2 J. J. Marsh, 405, and *Edmonson* " v. *Mosby's Heirs*, 4 *ib.* 497), the right to file an original " bill is placed on the ground of fraud in the original de-

" decree. So in Ohio, in the case of *Mossie* v. *Matthew's* " *Ex'rs and Wallace*, 12 Ohio, 351.

" We are inclined to go to the extent of the rulings of " the English courts, and not confine the right to cases " where fraud has intervened to obtain a decree against " infants. The rule in *Richmond* v. *Tayleur*, 1 P. Wms., " 734, and recognized by Mitford, is a just rule, and we " cannot anticipate any evils in its application, in this " state, to cases as they may arise.

" The interests of infants are the peculiar care of courts, " and if their rights have been outraged and disregarded " by an unfaithful guardian, the courts should not be slow " to apply a remedy."

The court then proceeds to discuss the facts of the particular case and finds that the decree was erroneous, and the same was set aside.

In the case of *Kuchenbeiser et al.* v. *Beckert et al.*, 41 Ill., 172, a bill was filed by certain parties seeking to impeach a decree previously rendered against them while they were minors. The court say:

" It was urged that the trial was had and the decree " executed and carried into effect so long since, that it " should not now be disturbed. This would be unques- " tionably true, had the parties all been adults when the " decree was rendered, or had the period elapsed, which " bars a writ of error, after the minors had become of age. " But under our practice a minor defendant to a bill is " entitled to his day in court, whether it is expressly re- " served by the decree or not, and he may at any time " during his minority, by his next friend or guardian, file " an original bill to impeach a decree against him. *Loyd* " v. *Malone*, 23 Ill., 43. It was held in that case, that " such a bill might be filed to impeach a decree for fraud,

" or even for error appearing in the former decree. With " that rule we are satisfied, and have no disposition to " limit or qualify its application in practice. And, as it " appears that Henry May was, at the time this bill was " brought, still a minor, as well as at the time the former " decree was rendered, he, therefore, had the right to file " a bill to impeach that decree for fraud, or even for an " error appearing on face of the decree.

" Treating this bill, as we think we should, as an origi- " nal bill to impeach the former decree, were complain- " ants entitled to the relief sought? It is manifest, from " the evidence upon which that decree was rendered, that " it fails to authorize the decree.

* * * * *

" The former decree being clearly erroneous, and " Henry May being a minor when this suit was brought, " he must be allowed his day in court, for the purpose of " avoiding the decree. Such is the practice, and we re- " gard it reasonable and just, that minors of tender " years, who are incapable of looking to and protecting " their interests, and where their rights are entrusted to " others indifferent to their welfare, or whose interests " clash with the rights of the minor, should have the " right, on arriving at age, to impeach a decree for error, " where the decree injuriously affects their rights. We " deem it unnecessary to discuss the question of fraud in " procuring the decree."

In the case of *Hess et al.* v. *Voss et al.*, 52 Ill., 472, the court say:

" The decree rendered by the court was warranted by " the master's report. Nor does the practice require that " the infant defendants shall have a day in court given " specifically in the decree. This was not error, as this

"court has repeatedly held that whether the decree gives "a day in court or not, a minor may file a bill to impeach "a decree procured by fraud, or for error appearing "upon the face of the decree. *Kuchenbeiser* v. *Beckert*, "41 Ill., 172; *Loyd* v. *Malone*, 23 Ill., 43. In this latter "case the authorities are reviewed, and it is held that an "infant may file such a bill to impeach a decree for fraud, "or error apparent on the decree, and is not driven to a "bill of review or a rehearing. We perceive no reason "for overruling or modifying the rule there announced. "When other rights have attached since the rendition of "the decree sought to be impeached, it might be that "such rights would be protected precisely as they would "under a reversal on error."

In the case of *Gooch* v. *Green*, 102 Ill., 507, which was a case wherein a bill was filed by a minor, by his guardian, to set aside a decree entered against the minor, the court held that the bill was properly filed, regardless of the question of fraud. The court say:

"This is not strictly a bill of review, as intimated by "counsel for defendant in the argument, and hence the "authorities cited, which control the practice where a bill "of review is filed, cannot control here; but as we under- "stand the record, this is an original bill, brought by a "minor to impeach a decree for fraud and error appear- "ing on the face of the decree. The right of a minor to "maintain a bill of this character was settled in *Loyd* v. "*Malone*, 23 Ill., 43, where the authorities were reviewed, "and it was expressly decided that an infant might file "an original bill to impeach a decree for fraud or error "appearing on the face of the decree. This was fol- "lowed by *Kuchenbeiser* v. *Beckert*, 41 Ill., 172, where "it was held that where a decree has been rendered

"against a minor defendant he is entitled to his day in "court, whether the right is expressly reserved in the "decree or not; and he may, even during his minority, "by his next friend or guardian, file an original bill to "impeach the decree, either for fraud or error appearing "on its face. If, then, there was error or fraud in the "decree, the complainant had the right to bring his bill.

"This brings us to a consideration of the allegations of "the bill. The bill, it will be observed, contains several "distinct grounds of relief, and if any one of them is "well founded in equity, the court erred in sustaining "the motion to dismiss, which is to be treated as a general "demurrer.

"It is a rule in equity proceedings, where the bill sets "forth various claims to the interposition of the court, "and the defendant files a general demurrer, the de-"murrer should be overruled if any of the claims be "proper for its jurisdiction; and a demurrer to the whole "of a bill, containing some matters relievable and others "not, will be bad, unless it be for multifariousness. "*Brown* v. *Hogle*, 30 Ill., 119; Story's Eq. Pleadings, "Sec. 443.

"It appears from the allegations of the bill that in the "partition decree six-sevenths of the lands were decreed "to Henry W. Green, and one-seventh to complainant, "Allen Gooch; that George Moreland, Samuel S. Yan-"away and Joseph Havens were appointed commission-"ers to apart and divide the lands according to the rights "of the parties, as found by the decree. Under this de-"cree it was the manifest duty of the commissioners to "set off six-sevenths of the lands to Green and one-"seventh to Gooch. This, however, they failed to do, "but, on the contrary, they set off to Green, as appears

"by the report, more than six-sevenths of the lands, and "in order to compensate Gooch for this disregard of "duty they required Green to pay him, in cash, $150. "The commissioners had no authority, under the statute, "to make such a division of the lands, and the decree "confirming the report was erroneous."

"A minor cannot sell and convey his lands, nor can the "court properly decree a sale of lands belonging to a "minor, except upon an application for that purpose in "the mode prescribed by statute. The effect of the de- "cree, however, rendered in this case, was to divest the "minor of the title to a portion of his lands. It in effect "transferred a portion of the lands to Henry W. Green "for the sum of $150. It may be that the land trans- "ferred by the commissioners to Green was not worth "more than the amount allowed him; but that does not "affect the question. They had no authority, under the "decree, or the statute under which they acted, to take "any part of the land that belonged to the minor, and "for a consideration in money transfer it to another. "When the report of the commissioners was submitted "to the court, showing, as it did, this unauthorized act, "the court should have set the report aside. This was "not, however, done, but a decree of confirmation was "rendered, and in our judgment this error, of itself, is "enough to impeach the decree."

* * * * *

"Much stress has, however, in the argument, been placed "on the fact that the decree sought to be impeached was "rendered by agreement. That fact can have no bearing "here, as an infant is not bound or concluded by an agree- "ment. In a proceeding in chancery a decree can not "properly be rendered against a minor, unless it is

"founded upon and sustained by the evidence. It is er-
"roneous to take a decree *pro confesso* against a minor,
"nor can a decree be properly rendered by the agree-
"ment of a guardian that the allegations of a bill are
"true. The correct rule upon this subject is laid down
"in *Quigley* v. *Roberts*, 44 Ill., 503, where it is declared
"that a decree cannot be rendered against a minor unless
"it be in proof of the allegations of the bill."

This question was again fully considered by the Supreme court of Illinois in the case of *Loyd* v. *Kirkwood*, 112 Ill., 329. The court in that case held that the bill was properly filed to set aside a former decree against the minor upon the sole ground of error in the proceedings. No question of fraud or of the jurisdiction of the court entering the former decree was involved. The court say:

"The question is then presented, whether the decree
"of 1874 can be successfully assailed by a bill of either
"character indicated. The authorities are universally
"agreed that a decree against an infant may be so at-
"tacked for fraud, and this is conceded by appellees; but
"they are not so agreed where the decree or judgment
"is assailed for error, merely. Upon this proposition
"there is considerable diversity of opinion. By the law
"as it is judicially declared in England, and in many of
"the states here, a decree against an infant is not absolute
"in the first instance. It is binding *sub modo* only. On
"becoming of age he is entitled to his day in court to
"show cause against the decree, and his right to do so
"must be expressly reserved by the decree itself, other-
"wise it will be erroneous, and subject to be reversed
"and set aside. In many of the states, however, includ-
"ing our own, a decree against an infant, like that

"against an adult, is absolute in the first instance, sub-
"ject to the right to attack it by original bill, for either
"fraud, or error, merely; but until so attacked, and set
"aside or reversed, on error or appeal, it is binding to
"the same extent as any other decree or judgment. This
"right to attack a decree by original bill may be exer-
"cised at any time before the infant attains his majority,
"or at any time afterwards within the period in which
"he may, under the statute, prosecute a writ of error for
"the reversal of such decree. (*Kuchenbeiser et al.* v. *Beck-*
"*ert*, 41 Ill., 172.) In this case, which was a bill to im-
"peach and set aside a decree against an infant, the rule as
"above stated is expressly laid down, and has been fol-
"lowed in subsequent cases. The rule thus established
"is, of course, subject to the qualification that the decree
"of a court having jurisdiction of the subject-matter of
"the suit and the person of the infant against whom it is
"rendered, will not be thus set aside as against third par-
"ties who have in good faith acquired rights under it;
"but as against original parties to the suit, and their legal
"representatives, the rule as above stated will be en-
"forced. Freeman on Judgments, Sec. 513.

"In *Loyd et al.* v. *Malone et al.*, 23 Ill., 43, this court,
"after citing *Richmond et ux.* v. *Tayleur*, 1 P. Wms., 734,
"and other English cases, together with the rule
"as laid down in Mitford's Chancery Proceedings, Sec.
"113, in support of the position that an original bill will
"lie to impeach a decree against an infant for mere error,
"and after citing certain cases in New York, Kentucky
"and Ohio, where the right to file such bill is limited to
"cases of fraud, proceeds to say: 'We are inclined to
"go to the extent of the rulings of the English courts,
"and not confine the right to cases where fraud has in-

"tervened to obtain a decree against infants. * * *
"The interests of infants are the peculiar care of courts,
"and if their rights have been outraged and disregarded
"by an unfaithful guardian, the courts should not be
"slow to apply a remedy.'

"The rule here adopted, upon a deliberate considera-
"tion of the authorities on both sides of the question, has
"been frequently recognized by this court, and whatever
"the rule may be elsewhere, it must be regarded as set-
"tled in this state. (*Kuchenbeiser et al.* v. *Beckert*, *supra.*)
"Whenever the property rights of an infant are drawn
"into litigation, and the infant himself, whether as plaintiff
"or defendant, has been brought into court, he at once
"becomes the ward of the court, and as such it is the
"duty of the court to see that his rights, as such, are
"properly protected. If, having a legally appointed guar-
"dian such guardian does not appear to the action for the
"purpose of managing his suit, it is the duty of the court
"to appoint a guardian *ad litem* to perform that duty. If
"the guardian who undertakes the performance of this
"trust, whether he be a general guardian or merely a
"guardian *ad litem*, fails to properly protect the interests
"of the ward, it is the duty of the court, *sua sponte*, to
"compel him to do so whenever the fact in any manner
"is brought to the notice of the court. If, for instance,
"the infant is defending, and his guardian has failed
"to file some pleading essential to the admission of his
"defense, or has filed one so imperfect as not to be suffi-
"cient for that purpose, it is the duty of the court, when-
"ever the fact is disclosed, to see that the proper plead-
"ing is filed on behalf of the infant before proceeding.
"These general propositions are so well settled and un-
"derstood that they will hardly be controverted. Look-

"ing at the record before us in the light of these well "recognized principles, and the authorities heretofore "cited, we think there can be but little, if any, doubt that "the cross-bill showed such a state of facts as entitled the "complainant to relief.

"Passing over all other matters set up in the cross-"bill, without expressing any opinion upon them the one "way or the other, and coming at once to the question of "delay in filing the bill in 1874 to establish and enforce "the alleged trust, we have no hesitancy in holding that "under the circumstances, as shown by the record, a de-"lay of some twenty-five years, as was the case there "before attempting to enforce the trust, afforded a com-"plete defense to the bill, and this fact being apparent "upon the face of the bill, the court should not have per-"mitted the decree to have passed as against an infant."

It is well settled by the cases cited above that decrees in the State courts of Illinois against minors may be attacked by original bill for either fraud or error in the proceedings upon which the decree was entered, and that it is not necessary that any application should be made for a rehearing, or that a writ of error should be sued out to a higher court. The remedy is placed distinctly upon the same basis as though the decree itself had reserved the right to the minor, after attaining his majority, to have the same annulled and set aside for cause shown. The court, in several of the cases, reviews the evidence upon which the decree was based to determine whether the same was sufficient.

There is nothing in the facts of this case which takes it out of the general rule as above laid down that the decree entered against appellant was subject to be set aside by an original bill, for fraud or error. The prin-

ciple upon which the right to file bills of this class is based is to protect the minor against having his property taken away from him by decrees of court by reason of a want of proper presentation of his case by those representing him during his minority. The remedy secured by filing an original bill grows out of and is in lieu of the original practice in chancery of allowing a certain length of time after arriving at age to show cause why the decree should not stand against him. The relief granted under such a bill does not impeach or affect the right of any third parties based upon the original decree prior to the filing of the bill to set the same aside. If the bill is sustained it only secures to the minor the right to be heard touching the matter in dispute. It does not deprive the other party of his true or just rights in the premises. Both parties are entitled to be heard if the original decree is set aside and the court will enter a decree according to right and justice. In this case the decree complained of was entered under a cross-bill filed by Simon B. Buckner and his wife. This bill was dismissed by the Circuit court and an appeal taken by Simon B. Buckner and his wife to the Supreme court, which court, upon the case as then presented, reversed the decree of the Circuit court and directed a decree to be entered in accordance with the prayer of the cross-bill. The Circuit court, in pursuance of the mandate of the Supreme court, entered the decree now complained of. Upon the appeal from the decree so entered the Supreme court held that the only question which could be raised by such appeal was whether the Circuit court had obeyed the mandate of the Supreme court. The errors properly assignable upon such an appeal were of necessity limited to the question as to whether the Circuit court had erred

in the decree entered and inasmuch as the Circuit court was acting in pursuance of the mandate of the Supreme court the only question was whether the Circuit court had obeyed the mandate. The Supreme court, in its opinion granted after a rehearing upon the second appeal, say:

"The questions raised and attempted to be raised were "all carefully considered, and the conclusion arrived at "was that no error could be assigned upon the first de- "cree entered in pursuance of the directions of this "court."

Kingsbury v. *Buckner*, 70 Ill., 522.

It is clear that the reason of the rule allowing a minor to file a cross-bill to impeach a decree for fraud or error has full force under the facts presented by this case. If the Supreme court directed the entry of an erroneous decree by reason of the want of a proper defense in the Supreme court the same reason exists for allowing the minor to attack the decree so entered as would exists if such erroneous decree had been entered in the first instance by the Circuit court. The decrees of all courts having jurisdiction of the person and subject-matter are equally conclusive and binding if not appealed from or taken to a higher court by writ of error. The rights of a minor are equally liable to be prejudiced by the want of a proper presentation of his case in the Supreme court as in the Circuit court. If the decree entered had been in the old English form, allowing the minor a certain length of time to impeach the same after arriving at age, he could have asserted his rights under such a decree, even although it had been entered under the mandate of the Supreme court. In point of fact, the first and only hearing of the original suit was in the Supreme court.

It would be indeed a hardship if the minor could be deprived of all right of relief and all right to be heard upon attaining his majority by the complainants permitting the bill to be dismissed in the Circuit court and through the neglect of the guardian *ad litem* in making defense procure a mandate of the Supreme court directing a decree to be entered against the minor. The right of a minor to file a bill to set aside a decree in the same court in which the decree was rendered for error is an exception to the ordinary rules of law, and the reason which creates such exception requires that the right to file such bill should extend to a decree so entered in pursuance of a mandate of the Supreme court.

II.

THE DECREE SOUGHT TO BE ANNULLED WAS ERRONEOUS, AS SHOWN BY THE RECORDS OF THE PROCEEDINGS UPON WHICH THE SAME WAS ENTERED.

Attached to the bill filed in this case was a complete transcript of the record of the case in the Supreme court of the State of Illinois upon which the mandate was issued requiring the Circuit court to enter the decree complained of. This transcript was also offered in evidence, and formed a part of the record upon the hearing in the Circuit court. (Rec., 201–209 *et seq.*) There was also offered in evidence the opinion of the Supreme court, found in Vol. 58, Ill. Rep., page 310. (Rec., 201.)

Did the record upon which the decree was entered entitle the complainants in the cross-bill to the property given them by said decree? The deed was executed on the 15th of May, 1861, after the commencement of the

civil war. Buckner and his wife were residents of the State of Kentucky, and early in September of the same year Buckner entered the Confederate army with high rank and continued in said army until the close of the war. His wife resided with him in Kentucky and was with him within the Confederate lines during the war. Under the laws of the State of Illinois, Gen. Buckner had an estate for his own life in the Chicago property, issue having been born of his marriage with Mrs. Buckner, who inherited the property from her father. The Chicago estate was one of large value—valued by none of the witnesses at less than $250,000, and by some as high as $500,000. The deed was executed in great haste and sent to the agent in Chicago having charge of the property, with instructions that Gen. Buckner, who had hitherto had the control of the estate for many years, did not wish to give any further directions in regard to the property, and all his connection with the property ceased from that date. The deed was made to a young officer of the army of the United States going into active service, without any agreement of any kind indicating that the Buckners were to have any interest in the property thereafter. While no money was paid, the deed was made to a relative, and was recited to have been made "in "consideration of the sum of one dollar and the natural "love and affection we bear to our brother, Henry W. "Kingsbury." Gen. Buckner testifies:

"I appeared to be the owner of a part of the property "known as the 'Kingbury tract,' on the Chicago river by "a deed made to me by Maj. Julius J. B. Kingsbury in his "lifetime, but was in fact only a trustee for the heirs, and "I had some interest as husband in the share of my wife "in the property in Chicago, descended from her father,

" and I had intended for a long time before the deed " marked " Exhibit A " was made to divest myself of all " such interest for the benefit of my wife. *The disturbed " condition of the country and the uncertainty of future " events in May, 1861, induced me to put in execution such " intention at that time without further delay.* I accord- " ingly consulted with my wife and determined to convey " her title and interest, together with the property or title " held in my name, to her brother, with the view of " having an undivided half of all the real estate situated " in Chicago and which formerly belonged to Major " Kingsbury conveyed to my wife or in such way to give " her the full control and benefit of all of her estate de- " rived from her father free from any interest of mine. " The deed was made in pursuance of such purposes and " no other, and with the full expectation that it would be " accomplished in such way as might be directed by my " wife. My wife and myself both had implicit confidence " in her brother, and were on the most intimate and " affectionate terms with him, and the idea that any ad- " vantage would be taken of the conveyance to him did " not enter our minds." (Rec., Ans. to Int. 19, page 110.)

" Int. 4. State whether or not the condition of the " country had any influence in the making of said deed of " May 15, 1861. And if so, what?

" Answer to Int. 4. As far as the disposition of my own " property was concerned, whether derived from inherit- " ance or obtained by purchase, it exercised no influence " on my action; but, as I have already fully stated, *the " disturbed condition of the country was the occasion, but " not the cause, of my making that deed.*" (Rec., 122, 123.)

" Answer to Int. 32. I met Henry W. Kingsbury in

"Washington city in July, 1861. I reached that place on "the 4th of July of that year and left on or before the 9th "of the same month. Henry was there in Washington "or near there, on the staff of Gen'l. McDowell, and I "met him three or four times I think, while I was there. "There was nothing said about the property in Chicago "at the first or second interviews. At the third or fourth "interview we were walking on the street near the presi- "dent's house, and he was talking of the troubles in this "country, when I remarked to him, 'By the way, the "property of your sister has been deeded to you and I "want you to look after her interests and see that she "has her property;' and he remarked "That was all "right or very well,' or some words to that effect. This "is the substance of the conversation. That was the only "conversation I ever had with him on the subject, and I "never met him after the deed was made except on that "visit to Washington city." (Rec., 113.)

William F. Barrett, the attorney who acted for Mr. and Mrs. Buckner in preparing the deed of May 15, 1861, testified:

"Answer to Int. 9. I was intimate with Gen. Buckner "and his wife, and I knew their wishes in relation to the "wife's interest in the property inherited by her from her "father. She desired him to have a greater interest than "he was entitled to by virtue of the marriage. He desired "that she should have the entire benefit of the same, and "I had had conversation with her repeatedly on this point. "Whether her husband was present at the first interview "I cannot say. Buckner was absent from Louisville when "his wife informed me that she was determined to exe- "cute the deed, and I, at her request, telegraphed him to "return home, which he did. He was then in Frankfort,

"Kentucky. I advised her not to sign the deed at that "time. *She insisted on doing so, and hence I telegraphed "Buckner and thus procured his presence.*" (Rec. 129, 130.)

Mrs. Jane C. Kingsbury, the mother of Mrs. Buckner and of Henry W. Kingsbury, testified:

"Answer to Int. 19. In August, or September, 1861, "here in Old Lynn, I had a conversation with my son. I "asked him in regard to his sister's property, whether it "had been turned over to him (Henry) and told him "Simon had told me so. He replied, 'That is so, but "don't look concerned; *it is only turned over to me for "safe keeping;* it will be restored to her.'

"I had another conversation with him in December, "1861, when he was here with his bride. He arrived on "the 9th and left on the 11th. The conversation was on "the 10th. He then made the same remark, that the "property would all be restored to her. I then asked him "who was to see it. He replied, 'If I am taken away "and General Burnside lives he will see to it for you, that "Mary's property is restored to her.' He says, 'I am "going to make my will; I am going to give you twenty "thousand dollars, to do what you please with at your "death — I mean mine—out of my property, and not my "sister's.' He said he hoped the war would soon close "and Mary would come home and attend to her own "property. This was the last time I saw him. The per-"son referred to as 'Simon' was Mr. Buckner." (Rec., 140, Ans. to Int. 19.)

Kingsbury, in a letter to his mother dated October 23, 1861, says:

"I spent all the morning with Burnside yesterday.

"He states, as I told you, that Simon had made over all "the Chicago property that was held in his name to me. "A new power of attorney is therefore necessary from "you and myself. We made one out. I signed it. Burn- "side will send it to you. I send you a copy for your "own keeping and keep one for myself." (Rec., 147.)

The allegation of the cross-bill under which the decree was entered in regard to the execution of said deed is as follows:

"And your orators unto your Honors further show that "the said Henry W. Kingsbury, now deceased, was not "present when said deed was executed by your orators; "that he had no previous knowledge of the intention to "execute the same, and that such deed was executed, "acknowledged and recorded without the said Henry W. "Kingsbury having any information or knowledge what- "ever upon the subject, and that he remained ignorant "that such deed had been so made for several weeks, "when he was informed of the facts in the premises, and "they aver that the deed was made without any con- "sideration, contract, arrangement, bargain or promise "whatever, and while the said Henry W. Kingsbury "was ignorant thereof, and the deed was made under "the circumstances herein set forth; the sole purpose of "your orators in executing the same was to vest the title "of the property described in said deed in trust, and "there was no purpose whatever on the part of either "of your orators to make a gift of said property or any "part thereof to the said Henry W. Kingsbury, or to "grant the same to him except as a naked trustee with- "out any beneficial interest, and your orators, advised by "counsel, claim that by the rules of equity a trust created "by implication of law, or a resulting trust, arose for the

"use and benefit of your orators to the extent and ac-
"cording to their respective interests and title when such
"deed was made."

"And your orator, Simon B. Buckner, for himself
"alone, shows unto your Honors, that it was his intention
"to waive all claims to said property and to allow his
"wife the sole use and enjoyment thereof, and to place
"the control of the same in her own family, and that such
"intention had existed for a long time; yet he now claims
"all his legal and equitable rights in the premises and
"asks that the trust created and arising as aforesaid may
"be enforced so as to enable him to carry into effect his
"unaccomplished intention, and he hereby offers to allow
"any decree your Honors may see proper to render in
"this case to confer the sole control and benefit of said
"property on his wife, her heirs and assigns.

"Your orators aver that they had full confidence in
"the affection and integrity of the said Henry W. Kings-
"bury, and voluntarily made such deed in the manner
"aforesaid, believing that he would permit them to re-
"ceive the rents and profits and convey or reconvey the
"premises as he might be requested by your orators or
"either of them." (Rec., 66.)

It will be noticed that Gen. Buckner himself states that *the disturbed condition of the country was the occasion of the making of the deed of May 15, 1861*, and that the attorney who drew the deed states that Mrs. Buckner was so urgent about the immediate execution of the deed that Gen. Buckner was telegraphed for; that Mrs. Kingsbury, Mrs. Buckner's mother, expressed great anxiety about having the property left in the shape it was in Henry W. Kingsbury, who was an officer in the army and subject to the casualties of war; that Kingsbury

stated to his mother *that it was deeded to him for safe keeping;* that Gen. Buckner, by his letter to the Chicago agent absolutely severed his connection with the management of the property in May, 1861, although he then still lived in Louisville; that notwithstanding the extreme care, caution and anxiety about the condition of this property it was left designedly in Kingsbury's name, without the scratching of a pen to show any interest in the Buckners, and the occasion of this action was the disturbed condition of the country. It is impossible that this course should have been pursued for the mere purpose of getting the title into Mrs. Buckner free from the interest of her husband.

If this had been the sole object of the deed, why would he have severed his connection with the active management of the property? There would in such case have been no reason for great haste in the execution of the deed. There would have been no reason for not allaying the anxiety of Mrs. Buckner's mother by having the property deeded to Mrs. Buckner; there would have been no reason for having the property deeded to an officer in the Federal army subject to the casualties of war. On the other hand every step taken has a reason to support it if General Buckner desired to leave himself and his wife free to act in regard to the troubled condition of the country without jeopardizing the ownership of the Chicago property. The conclusion is irresistible from the undisputed facts disclosed by this record that the object of making the deed of May 15, 1861, was to leave the Buckners free to take sides in the Civil war against the United States without jeopardizing this large estate in the city of Chicago.

But it is suggested that General Buckner did not transfer

his own property in the State of Kentucky. The situation of that property was very different. It was comparatively small in amount, situated within the state of which he was a citizen, and which he doubtless expected would adhere to the Confederate cause. The Kentucky property, both by its situation and its amount, was not subject to the same liability of seizure as the Chicago property. The only reason given for the execution of this deed by General Buckner is that it was in pursuance of a desire on his part to vest his interest in the property in his wife, which his wife was always opposed to his doing. The deed in question was executed at the urgent solicitation of the wife who had her husband telegraphed for that it might be executed immediately. This is conclusive that the object of the execution of the deed was not for the purpose of vesting the husband's interest in the wife, as she never desired that this should be done. If the record upon which the case was heard disclosed, as clearly it does that the object for which the deed was made, was to leave the parties free to participate in the rebellion without risking the title to their property situated in the loyal part of the country, it is clear upon principle that the parties would not be entitled to file a bill in equity to recover back the property after the war was over. It is well settled that a party who makes a deed to a third party to defraud his creditors cannot subsequently file a bill for a reconveyance of the property. He does not come into a court of equity with clean hands, and no relief can be granted to a party thus situated. One who has made a deed to a third party to leave himself free to fight his country is certainly in no better position in a court of equity than one who has made a deed to defraud his creditors. The defense here insisted upon was not

presented or called to the attention of the Supreme court of Illinois upon the hearing of the case in that court. An examination of the opinion, which was filed in that cause, and which was offered in evidence in this case will show that there is no allusion whatever to this phase of the case or defense to the cross-bill in said opinion. If upon the hearing in the Circuit court a decree had been entered in favor of the complainants in the cross-bill upon the same record it is clear, under the authorities in Illinois, that an original bill by the minor would lie to impeach the decree for error. This defense or phase of the case not having been called to the attention of the Supreme court, and the rights of the minor having been sacrificed thereby, there is the same reason and necessity for permitting an original bill to be filed to impeach the decree for error that there would have been had a decree been entered in the first instance by the Circuit court.

III.

THE DECREE ENTERED UPON THE CROSS-BILL WAS VOID FOR WANT OF JURISDICTION.

No process was issued upon the filing of the cross-bill; nor was any notice thereof ever served upon appellant. Upon motion of complainants in the cross-bill, a guardian *ad litem* was appointed for appellant, who thereupon filed his answer. It is clear that the Circuit court did not acquire any jurisdiction over appellant by the order appointing the guardian *ad litem*. (*Chambers* v. *Jones*, 72 Ill., 275.) Whatever jurisdiction was acquired over appellant was acquired solely by the filing of the original bill and the jurisdiction so acquired was of necessity limited and restricted to the subject-matter of

the original bill. The jurisdiction of the court over appellant could not be enlarged by the filing of a cross-bill upon which no summons issued, and of which appellant had no actual notice, he being a minor and not entering any appearance in the cause. As to any new subject-matter of litigation introduced by the cross-bill, it is in the nature of an original bill; and as to such matters the court does not acquire jurisdiction by the filing of the original bill.

Story's Equity Pleadings, Secs. 398 B, 399, 401.

An examination of the original bill discloses that its sole subject-matter was the claims set up by Mrs. Buckner and others under the pretended will of Henry W. Kingsbury. The original bill recites the death of Julius J. B. Kingsbury, owning real estate in Chicago, leaving him surviving his widow, and Mrs. Buckner, and Henry W. Kingsbury, his only heirs at law; the making of the deed from Buckner and wife to Henry W. Kingsbury, the marriage of Henry W. Kingsbury, his death, and the birth and heirship of the complainant, that Henry W. Kingsbury died intestate, seized in fee of the Chicago real estate, and that complainant was the owner thereof, subject to certain dower interests; the filing of certain bills for the assignment of dower, the making of the pretended will by Henry W. Kingsbury and the proceedings in relation thereto, and charges that said will was inoperative to deprive complainant of his inheritance, because it did not appear that it was the intention of complainant's father to disinherit him, and that the will was invalid to pass the title of real estate in Illinois because not executed in the presence of witnesses, as required by the statute of Illinois; that the will was not properly ad-

mitted to probate in Virginia, and other reasons why the will was invalid; that the Buckners and others claimed an interest in the complainant's estate under said will, and prays that the pretended will may be declared invalid, and that the proceedings admitting the same to record in Cook county may be reversed and declared null and void as constituting a cloud upon appellant's title to the real estate inherited from his father. While the original bill recites the making of the deed of May 15, 1861, in setting out and describing the property which he owned as heir of his father, and prays that his title to said property may be confirmed, it is clear from an examination of the bill that the sole subject-matter of the bill was the pretended will, and the claims set up thereunder. At the time of the filing of the original bill in July, 1870, no claim of any right had been asserted by the Buckners to the Chicago property, except by the probating of the pretended will in May, 1870, and the subsequent recording of the same in Cook county. From the date of Kingsbury's death in 1862, the widow and heir of Kingsbury had been in the undisputed possession of the property in question, subject to the dower of his mother, either through his guardian or a receiver, for the benefit of himself and his mother. The subject-matter and scope of the bill would not have been different had the complainant simply stated that his father was seized of valuable real estate in the city of Chicago, that he died intestate, leaving a widow and complainant, his son and only heir, the making of the pretended will, and the subsequent proceedings in relation therety, and the claims set up thereunder, and praying that the will might be declared void, and the proceedings in relation thereto be canceled as a cloud upon his

title, and that his ownership of the property owned by his father at the date of his death, as sole heir, might be confirmed and established as against all claims thereto under said will. The sole object of the suit in either case would be to establish the right of complainant to the ownership of his father's estate as his heir, and to cancel as a cloud upon such ownership the record of the pretended will. Did the court by the filing of such a bill acquire jurisdiction over the complainant to decree that his father was not the owner of certain specific property, situated in the city of Chicago? The subject-matter of the cross-bill was the validity and effect of the deed from the Buckners to Henry W. Kingsbury, father of appellant, made in 1861. The subject-matter of the original bill was the effect of the pretended will of Henry W. Kingsbury upon the heirship of appellant to whatever property his father died seized of. The Circuit court did not acquire jurisdiction over appellant to enter a decree which would bind him in regard to the first subject-matter by reason of his filing a bill with relation to the second subject-matter.

IV.

THE DECREE SOUGHT TO BE ANNULLED WAS PROCURED BY MEANS OF COLLUSION WITH THE GUARDIAN AD LITEM OF APPELLANT.

The decree dismissing the bill in the Circuit court of the United States, did not pass upon this issue upon the facts, but is based upon the statement that no replication was filed on behalf of the minor to the answer denying fraud. The replication to the answer was in fact duly filed, and will be found on page 198 of the record.

The issue upon this question is submitted upon the record of the proceedings in the State courts without any evidence explaining any part of said proceedings or denying the correctness of any inferences which may be drawn therefrom. Appellant was not in a position to prove affirmatively a fraudulent agreement if one existed. He could only point to the facts from which fraud could be inferred. The guardian *ad litem* was made a defendant to the bill, and contented himself with demurring thereto, and without making any explanation of the course pursued by him. The attorney for Buckner, in the original suit, was on the stand as a witness in another matter, but made no explanation of the way in which the original case was conducted. Gen. Buckner was not called as a witness at all, although still living and accessible. Appellees upon this issue based their decree on the allegations of a fact which was not true, namely, that no replication was filed to their answer. The record of the original case discloses that cross-bills were filed on the 31st day of October, 1870, involving the title to an estate worth half a million dollars, and seeking to deprive the minor of an estate of that value of which his representatives had been in undisputed possession for more than eight years upon a claim which had never been heard of up to that date. The guardian *ad litem*, appointed by the court on the 24th of November, did not take the testimony of a single witness or propound a single cross-interrogatory. He did not object to the competency of the chief witnesses called in support of the cross-bill, who were incompetent under the laws of Illinois to testify against an heir. He waived the usual statutory notice of the taking of depositions. The last deposition in support of the cross-bill was taken on the

28th of December, and within three days thereafter an order was entered dismissing the cross-bill which order was entered *nunc pro tunc* as of the 24th of December, and by agreement with the guardian *ad litem* an appeal was prosecuted by the complainant in the cross-bill without an appeal bond, not to the next term of the Supreme court in the Northern grand division held in September, 1871, where the appeal by law should have been taken, but by agreement it was taken to the next term of the Supreme court in the Central grand division heard at Springfield, which commenced on the 3d day of January, 1871, and where, under the rules and practice of that court, the case was finally heard within three weeks thereafter. This was done not only without any objection on the part of the guardian *ad litem*, representing the minor, but solely by virtue of his stipulation, agreements and consent. Upon the hearing in the Supreme court no suggestion whatever seems to have been made as to the illegality of the purpose for which the deed was made, and which would prevent any relief being granted upon the cross-bill. When the decision of the Supreme court was entered, no petition for a rehearing was filed. It is certainly unprecedented in the history of litigation that a claim involving property worth half a million dollars should have been submitted finally to the Supreme court within less than ninety days after it was first heard of without the examination of a single witness on behalf of the defendant chiefly interested, or the cross-examination on his behalf of a single witness called in support of the bill; and that upon the record so made up the case should have been heard before it was entitled to be heard under the statutes of Illinois, either in the Circuit court or Supreme court, and all done only by the

active consent and agreement of the party representing the minor, and without any effort to present to the court a defense which would have been conclusive. Further, when the bill in question was filed charging that these proceedings were not defended in good faith, no explanation is vouchsafed by any of the parties by whom the proceedings were carried on.

No hardship is involved in the reversal of the decree dismissing the bill. If appellant is not and was not entitled to the property, he will not recover the same, even if the former decree is not held to be a bar. He only seeks by this bill to be heard upon the merits of the ownership of the property. He does not seek to disturb the interests of parties acquired under and by virtue of the decree entered on the cross-bill. It certainly is a great hardship upon appellant to hold that he is debarred from claiming property which descended to him from his father by a litigation conducted, as the litigation was conducted on his behalf by his guardian *ad litem*, in the former proceeding. It is no hardship upon appellees that the rights of the respective parties in the property should now be adjudicated according to justice and the right of the matter, regardless of said former proceedings. If in equity and good conscience they were entitled to recover the property they will still be able to hold and recover the same. If they were not entitled to the property then they ought not to complain if they are not allowed to retain it.

Respectfully submitted.

JOHN P. WILSON,
Attorney for Appellant.

Addendum.

For law establishing terms of Supreme court see Sec. 30. Art. 5. Const., 1848, and Sects. 4, 5 and 8. Art. 6. of Const. of 1870, and act passed February 22, 1867, fixing the second Tuesday in September of each year as the date of holding the annual term of the Supreme court in the Third (Northern) Grand Division. (See Session Laws of Ill. for 1867, p. 75.)

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SUPREME COURT OF UNITED STATES.

OCTOBER TERM, A. D. 1889.

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Appellant,

vs.

SIMON B. BUCKNER et al.,
Appellees.

Appeal from the Circuit Court of the United States for Northern District of Illinois.

BRIEF AND ARGUMENT.

LYMAN TRUMBULL,
(With John P. Wilson)
Of Counsel for Appellant.

HORACE O'DONOGHUE, BRIEF AND ABSTRACT PRINTER 100 S. JEFFERSON ST., CHICAGO.

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BRIEF AND ARGUMENT.

STATEMENT OF CASE.

A brief statement will, I think, enable the court to understand the questions involved in this case. Henry W. Kingsbury and Mary K. Buckner, wife of Simon B. Buckner, were the children and heirs at law of Julius J. B. Kingsbury, who died intestate, June 26, 1856, leaving a wife, Jane C. Kingsbury, who is still living, and real estate of considerable value, situate chiefly in Chicago. Henry W. Kingsbury, his son, was married to Eva Taylor December 4, 1861, and was killed at the battle of Antietam, September 17, 1862. Henry W. Kingsbury, his son, the appellant, was born after the death of his father, and is his sole heir at law. The estate of J. J. B. Kingsbury was never administered upon, and until 1861

was managed chiefly by Simon B. Buckner. May 15, 1861, shortly after the breaking out of the rebellion, in which Buckner soon after took an active part, he and wife, who had issue, conveyed their interest in the estate inherited from Mrs. Buckner's father, to Henry W. Kingsbury, appellant's father, by warranty deed, executed at Louisville, Ky. After the death of appellant's father, there was found a paper in his handwriting, in which it was stated, "Expecting soon to start upon "a military expedition where death may overtake me, "I leave this as a record of my wishes respecting the dis- "position of my property." He then leaves $20,000 to his mother. And to his sister, Mary K. Buckner, so much of the Chicago property held in his name as should amount to one-third of the property in the city of Chicago, Illinois, held by his father; a small bequest to his cousin, John J. B. Kingsbury; and the remainder of his property to his wife. Ambrose E. Burnside and John Taylor are named executors. The paper is dated Fortress Monroe, Va., March 25, 1862, and signed "Henry W. Kingsbury, First Lieutenant, 5th Regiment Artillery, U. S. Army," and is without witnesses. (*Printed Record, p. 37.*) After the execution of the deed by Buckner and wife to appellant's father, the property in Chicago was managed by his agent while he lived, and, after his death, by an agent appointed by the grandmother and mother of appellant, until 1870.

May 10, 1870, said writing was admitted to probate as the last will and testament of said Henry W. Kingsbury, deceased, in the Corporation Court of the city of Alexandria, Va., and Burnside qualified as executor. The record of said will and probate in Virginia was presented to the County Court of Cook County for record by Burnside, and recorded June 11, 1870, as the last will and testament

of said Henry W. Kingsbury, to be treated in like manner as a will executed in Illinois.

July 19, 1870, a bill was filed in the Circuit Court of Cook County in the name of appellant, of Newport, R. I., an infant seven years and seven months of age, by Corydon Beckwith, who tendered himself as his next friend, against Mary K. Buckner, Simon B. Buckner and others, all of whom were non-residents of the State, alleging, among other things, that the said Henry W. Kingsbury, deceased, was not, at the time of the execution of said paper, or at any time thereafter, an inhabitant or resident of the State of Virginia; that he had no property of any kind in the State of Virginia at the time of his death; that said Corporation Court of Alexandria, Va., had no jurisdiction to admit said paper to probate as a will; that said proceedings of the County Court of Cook County, in admitting the same to record, ought to be set aside, and that, even if said paper was a valid will, said minor was born after the making thereof; that no provision was made for him in said will, nor did it appear from the same that it was his father's intention to disinherit him, by reason of which facts said minor was entitled to receive out of the estate of his father the same as if he had died intestate, and, being the only heir, was entitled to the whole estate, subject to the dower of his mother and grandmother, and praying that the instrument purporting to be the last will and testament of Henry W. Kingsbury might be declared void as a will, as against the minor. No process was sued out upon this bill, or notice given by publication.

October 31, 1870, Mary K. Buckner and Simon B. Buckner appeared, filed an answer to said bill, and at the same time filed a cross-bill, setting up the invalidity of

the acknowledgment by Mary K. Buckner of her deed to appellant's father; also, the non-delivery of the deed, the validity of the will, claiming that their deed to appellant's father was in trust for Mary K. Buckner, and praying that it might so be declared; that an account be taken of the receipts and disbursements of the defendants to the cross-bill; that the grandmother and mother of the minor might have their dower set off; that partition be made of the real estate, and possession delivered to the cross-complainants as they were entitled. No process was sued out upon the cross-bill, or other notice given.

November 25, 1870, on motion of the cross-complainants, Beckwith was appointed guardian *ad litem* for appellant, and December 2, 1870, filed an answer to the cross-bill, denying the trust, and alleging that said pretended trust was not a resulting trust or a trust created by operation of law, and was not manifested by any writing signed by the minor's father, as required by the statute of frauds and perjuries, upon which statute he insisted. Issues were joined and testimony taken by the cross-complainants in support of their bill. No notice of the cross-bill was given to the minor by publication or otherwise, though it tendered new issues. The guardian *ad litem* waived the requisite notices for taking depositions by the cross-complainants, filed no cross-interrogatories, and interposed no objection to the testimony of Simon B. Buckner and Jane C. Kingsbury, who were parties to and interested in the suit, and upon whose testimony the case was made to turn. Replications were filed to the original bill, and a final hearing had December 24th, and on the same day, as the record shows, depositions were presented, taken by complainants in the cross-bill, at Louisville, Ky.; Lyme, Conn.; New York, and Chicago, the latter December 28th, four

days after the hearing. Both the original and cross bills were dismissed without prejudice, and by consent of parties, each was allowed to appeal to the Supreme Court of Illinois, Central Grand Division, without bond, the same being waived. (*Printed Record, p. 265.*) Cook County is situated in the Northern Grand Division of the State, and appeals under the constitution did not lie from the Circuit Court in that county to any other division, except by consent of parties.

The Supreme Court, October 5, 1871, reversed said decrees of the Circuit Court, and remanded the causes with directions to dismiss the original bill absolutely, and to grant the relief prayed for by the cross-complainants. (58 Ill. 310.) November 13, 1871, without notice to Henry W. Kingsbury, or his guardian *ad litem*, and without appearance by either so far as the record shows, a decree was entered by the Circuit Court of Cook County, dismissing the original bill, and finding that complainants in the cross-bill executed the deed of May 15, 1861, to Henry W. Kingsbury; that the same was a deed of trust for the use of the grantors, and that Simon B. Buckner had waived his life estate, directing the master to convey an undivided half of the premises in controversy to Mary K. Buckner, subject to the dower of Jane C. Kingsbury, divesting Simon B. Buckner of any interest therein, decreeing partition of the premises, and appointing commissioners to make the same. (*Record, p. 358.*)

At the January term, 1872, of the Circuit Court, another order was entered confirming the master's and commissioners' reports, except as to a certain tract of land, to which part of the reports the order recites that exceptions were filed by Henry W. Kingsbury by his guardian, and declaring that the execution of the decree should not

be stayed because of the pending of the questions raised by the exceptions. The decree also contains this stipulation:

"And it is mutually agreed that an appeal may be "prosecuted by either party from the decisions of the court "on such exceptions without interfering with this decree "or the partition of all portions of said property (other "than said tract or parcel of land) now approved by the "court, and that a writ of error may be prosecuted there-"from within sixty days, but not afterward; and it is "virtually agreed by all parties that no error shall be "assigned upon any appeal or writ of error because of "the approval of a part of the report of the commission-"ers and the reservation of the exceptions as to the other "part thereof." (*Record, p. 371.*)

In January, 1872, the said Mary K. Buckner was by a writ of assistance placed in full possession of the real estate set apart to her, being of the value of about $800-000; August 11, 1873, Henry W. Kingsbury, the appellant, then an infant of the age of ten years, suing by his guardian and mother, Eva Lawrence, who had in the meantime intermarried with Albert G. Lawrence, filed a bill against Simon B. Buckner and Mary K. Buckner, his wife, Jane C. Kingsbury, John J. D. Kingsbury, Ambrose E. Burnside and Corydon Beckwith, which is the present suit, in the Circuit Court of Cook County, to set aside the said decrees and judicial proceedings of the Circuit and Supreme Courts for want of jurisdiction, for fraud and collusion, and for errors apparent on the face of the record.

The bill alleges that said entire judicial proceedings and the decree in favor of the said Buckners, are fraudulent, collusive, erroneous, and wholly insufficient to bind or

conclude the complainant in any respect; that said decree was obtained by the habitual use of incompetent, illegal and prohibited testimony on the part of said Buckner and wife, to which said Beckwith consented; that, as appears by said record, the said Circuit Court of Cook County, and said Supreme Court of Illinois never had any jurisdiction over the person of appellant, or the subject matter of said cross-bill, to decree as to said pretended trust, or to order a conveyance divesting appellant of his estate, or to decree partition of his property, or to award possession thereof, or to compel appellant to account for the income of any part thereof; that the said Buckner and wife procured said decree against appellant by fraud and misrepresentation and the concealment of divers important facts material to the controversy, and by the use of false and fraudulent pleadings and testimony; that the said Beckwith negligently and collusively assisted the said Buckners in such concealment, and failed to offer proof or to bring the rights of appellant to the notice of the court; that appellant is entitled to show such matters in this court, and to have said decree and all decrees thereunder decreed fraudulent and void, and a decree requiring the said Buckner and wife to restore to appellant all his estate, which they have seized upon by virtue of such judicial proceedings, or allowing him to file a new answer to such pretended cross-bill, and to introduce evidence in his own behalf, and to make a new defense to said cross-bill; that the appearance of appellant was entered to the cross-bill by the filing of an answer by the guardian *ad litem*, in pursuance of the same amicable arrangement by virtue of which the said Buckner and others entered their appearance without process to the bill exhibited against them in the name of appellant; and that

the whole controversy was conducted as an agreed case between said Beckwith and said Buckners, and, being an infant, he claims that the said guardian *ad litem* had no authority to enter his appearance to said cross-bill or waive any objection to the jurisdiction of said court over his person, or the subject matter set forth in said cross-bill, or to bar him, being such infant, of any of his rights by agreeing to submit the same to the result of any such litigation; that said Beckwith accepted notice from complainants in cross-bill to take the testimony of said Buckner November 22, 1870, before he had been appointed guardian *ad litem*, when he had no authority to act for or represent appellant; that the said notice delivered November 22, 1870, specified that a commission would be sued out thereunder in eight days thereafter, instead of ten days, as required by law; that, while it appears in the record, that in said cross-bill, it was charged that the pretended trust was proven by a letter signed by the father of appellant, as explained by a conversation with the said Jane C. Kingsbury, set forth in said cross-bill, yet, in fact, when the said cross-bill, the answers thereto and the replication were filed, none of said allegations in regard to said letter or conversation were in said cross-bill, but the same were, after the contents of the deposition taken in Connecticut, December 20, 1870, had in some unlawful manner become known, with the consent of said Beckwith, and without notice or leave of court, or the withdrawal of said replication, fraudulently inserted in said cross-bill, and a decree obtained upon the very allegations then surreptitiously introduced into the cross-bill; that, as a matter of law apparent on the face of said decree, it was error to allow an appeal to the said Buckners from the decree dismissing their said cross-bill, with-

out appeal bond as required by law, and that the pretended waiver recited by the said Beckwith as guardian *ad litem* of appellant, was void

To give a full abstract of the bill would require its reprint almost entire. It is full of the statements of the waiver of the infant's rights, and of neglect to present them by his guardian *ad litem*. It states, among other things:

That in October, 1871, all the original papers and records in the original and cross suits were destroyed by fire, and that neither he nor his guardian had any knowledge of the erroneous and fraudulent proceedings aforesaid while the same were being hurried through the said Circuit and Supreme Courts, and had no opportunity to prevent such errors or frauds, or bring the rights of appellant to the notice of either of said courts, by rehearing or otherwise; and appellant did not make discovery of any of said errors or frauds until long after the decree of November, 1871, and the execution of said master's deed and the partition proceedings aforesaid, and too late, according to the ordinary course of equity practice, to obtain any relief in the said proceedings, by appeal or otherwise.

The bill waives answers under oath, and prays that said judicial proceedings, by virtue of which the Buckners claim title to and enjoy the possession of the property inherited by appellant from his father, may be declared to be utterly void and fraudulent; that he may be restored to his estate; for general relief, etc.

September 18, 1873 (*Record, p. 176*), Beckwith, one of the defendants, filed a demurrer to said bill. October 16, 1873 (*Record, p. 177*), the defendants, Simon B. Buckner, Mary K. Buckner and Jane C. Kingsbury, filed a joint and several demurrer to the bill. May 17, 1877, the

defendants, except Beckwith, withdrew their demurrer, and Simon B. Buckner, together with Ambrose E. Burnside, another of said defendants, filed a plea and answer to said bill (*Record, p. 180*). In their plea the defendants, Buckner and Burnside, set forth the substance of the bill filed July 19, 1870, by appellant, by his next friend, Corydon Beckwith, against them and others; the answer of said Mary K. Buckner and Simon B. Buckner to said bill October 31, 1870, the cross-bill by them filed on the same day against the said Henry W. Kingsbury, Eva Lawrence, Albert G. Lawrence and Jane C. Kingsbury, and the proceedings in the Circuit Court of Cook County, and in the Supreme Court, substantially as they are stated in the bill of appellant. The plea further alleges the allowance of an appeal to Henry W. Kingsbury March, 26, 1872, by his guardian, from an order of the Circuit Court of Cook County, directing the receiver to pay over to Mary K. Buckner, one-half the money collected from insurance policies; and also the allowance of an appeal to Henry W. Kingsbury, by his guardian *ad litem*, from a decree entered August 2, 1872, overruling certain exceptions to the master's and commissioner's reports, and from the decree confirming those parts of said reports to which exceptions had been filed, declaring the parties entitled to the land set off to them, the filing of the transcript of the record in the Supreme Court, by Henry W. Kingsbury, September 11, 1872, the errors assigned by *Anson Sperry*, his guardian *ad litem*, in the Supreme Court, and the points or objections to said decree made on the hearing in said court.

Said plea further alleges that January 20, 1873, the said Henry W. Kingsbury entered a motion in the Supreme Court to set aside said judgment of reversal entered October 2, 1871, to recall the mandate issued to

the Circuit Court, and to dismiss the appeal, wherein the said Mary K. Buckner was one of the appellants, upon the alleged ground that the appeal was docketed in said court upon a false record, upon the alleged want of jurisdiction in said court, evidences of fraud appearing in the record and the affidavits filed with the motion, and the overruling of said motion by the Supreme Court, May 24, 1873; its decision, that there was no error in said decree, except that the Circuit Court erred in finding that said Mary K. Buckner had any interest in the said so-called "Spencer tract," and in decreeing partition thereof, and for that reason the said Supreme Court reversed the said last decree of the Circuit Court, and remanded the said cause to said Circuit Court.

The plea further states that, afterward, the said Mary K. Buckner filed in said Supreme Court a petition for a rehearing in said cause, and a rehearing was granted, and, on the 8th day of November, 1873, said Supreme Court delivered another opinion to render the former opinion more explicit, and prevent misconception of its meaning, whereby the said court affirmed the several decrees and decretal orders antecedent to the decree of August 2, 1872, upon which error was assigned, and reversed said decree of August 2, 1872, concerning the said Mary K. Buckner's claim in said Spencer tract, and remanded the cause for further proceedings in conformity with the opinion of said court, as explained and modified by said last opinion.

The plea also sets forth a decree, entered March 7, 1877, sustaining the exceptions to the commissioner's and master's reports, so far as they related to what was known as the Spencer tract, and annulling the master's deed to Mary K. Buckner of one undivided half of said tract.

The plea, which is not sworn to, also denies all fraud and collusion. The answer of Simon B. Buckner and Ambrose E. Burnside, filed May 17, 1877, with said plea (*Record, p. 191*), denies that said bill of Henry W. Kingsbury, by his next friend, Corydon Beckwith, filed July 19, 1870, in the Circuit Court of Cook County, was filed in pursuance of any understanding between Beckwith and the Buckners; that the Buckners procured the decree mentioned in the bill of complaint against them by fraud or misrepresentation, by false pleading or collusion; and all other allegations in said bill alleging fraud, misrepresentation or collusion on the part of Mary K. Buckner, Simon B. Buckner, or said Beckwith.

June 23, 1877, the cause was, on the petition of the appellant, removed to the United States Circuit Court for the Northern District of Illinois. (*Record, p. 196.*) April 29, 1878, on the suggestion of the solicitor for the defendants, that John V. Le Moyne had been appointed guardian of Henry W. Kingsbury, the said Le Moyne was made party complainant in place of Eva Lawrence, and leave given to reply to plea and answer. (*Record, p. 197.*) May 1, 1878, replications were filed to the plea and answer of Simon B. Buckner and Ambrose E. Burnside. (*Record, pp. 198 and 199.*) May 8, 1878, the cause was referred to Henry W. Bishop, the master, to take proofs and report same to the court. (*Record, p. 199.*) May 18, 1878, the master filed his report of the evidence taken before him (*Record, pp. 200-201*), consisting of "a transcript of the "record from the Supreme Court of Illinois, Central Grand "Division, in the case of *Henry W. Kingsbury*, by his "next friend, *Corydon Beckwith*, v. *Ambrose E. Burn-*"*side et al.*, original bill; and *Mary K. Buckner et al.* "v. *Henry W. Kingsbury et al.*, cross-bill, certified

" by the clerk of that court on the thirty-first day of " October, 1871, ' Exhibit A.' (*Record. pp. 207 to 354.*) " An opinion of the Supreme Court, contained in volume " 58, page 310, of Reports of Illinois Supreme Court. " A transcript from the Supreme Court of Illinois in an " appeal of *Henry W. Kingsbury* v. *Mary K. Buckner*, " certified May 10, 1878, ' Exhibit B.' (*Record, pp. 354 to* " *377.*) A certified copy of the assignment in error in said " cause, certified October 24, 1873, ' Exhibit C.' (*Record,* " *p. 377.*) An opinion of the Supreme Court in said " cause, as found in volume 70, Illinois Reports, page " 514."

" A copy of the arguments in said cause, made by " Henry Crawford, as solicitor for the appellant, ' Ex- " hibit D.' (Printed as an addition to record.)

" Copy of the order of the Circuit Court of Cook " County, made on the eighteenth day of June, A. D. " 1873, reinstating said case, in pursuance of mandate of " the Supreme Court, ' Exhibit E.' (*Record, p. 391.*)

" Also a copy of a certain order and final decree, " entered in said cause on the seventh day of March, 1877, " ' Exhibit F.' (*Record, p. 392.*)

" Exhibit G " (*Record, p. 394*) is the copy of a motion by Anson Sperry, guardian of the estate of Henry W. Kingsbury, together with the following affidavit, to wit:

" STATE OF ILLINOIS, }
" COUNTY OF COOK, } ss.
" CITY OF CHICAGO. }

" I, William H. Wherland, being duly sworn, depose and say that the foregoing instrument of writing is a true copy of the original cross-bill in the cross-case of *Mary K. Buckner et al.* v. *Henry W. Kingsbury*, in the Circuit Court of Cook County; that the said copy was made by

me from the said original cross-bill, and the said copy is a correct and literal copy of the said cross-bill at the time the said copy was made. I was, at the time I made the said copy, in the employ of Messrs. Beckwith, Ayer and Kales, in their office, and made the copy at their direction, and it is the copy which was used in drawing the answer of Henry W. Kingsbury to the said cross-bill.

"My attention has been called to the following two paragraphs, which are printed in a printed copy of the record or a portion thereof, and containing what purports to be a copy of the cross-bill filed in said cause.

These paragraphs are as follows:

"And your orators further show that said will of the said Henry W. Kingsbury was made and executed in conformity to the laws of the State of Virginia, and on the 9th day of May, 1870, the same was proved before and admitted to probate by corporation court of the city of Alexandria, in the State of Virginia, a court having jurisdiction under the laws of that State of the probate of wills, as the true last will and testament of the said Henry W. Kingsbury, said court also having jurisdiction then and there to receive proof and admit to probate said will; and afterward, to wit, on the 11th day of July, 1870, a copy of said will and probate thereof, duly certified according to the laws of the State of Illinois, in such case made and provided, was presented to the County Court of Cook County, in the State of Illinois, and by said court, then and there ordered to be recorded, and to be good and available in law in like manner as wills made and executed in this State, and the same was recorded in accordance with said order.

"And your orators further show that the said Henry W. Kingsbury, on the 23d day of October, 1861, wrote with his own hand a letter to his mother, Jane C. Kingsbury, and signed the same by his signature 'Henry,' in which, among other things, he wrote: 'I spent all the morning with Burnside, yesterday. He stated, as I told you, that Simon had made over all the Chicago property that was held in his name to me. A new power of attorney is, therefore, necessary from you and myself. We made one out; I signed it. Burnside will send it to

you.' And they aver that the reference in said letter by the words 'as I told you,' was to a conversation between the said Henry W. Kingsbury and his mother, had in their last personal interview, before the date of said letter, in which the said Henry W. Kingsbury expressly admitted that he held all the property of your orator, Mary K. Buckner, inherited from her father, in trust for a short time, and said that he would restore it all to her whenever she desired."

These two paragraphs were not in the said original cross-bill at the time I made the foregoing copy thereof, nor when the answer of Henry W. Kingsbury to the said cross-bill was filed. They are inserted in the middle of a sentence, near the close of a paragraph in the original cross-bill, where the sentence is broken by a semicolon, and the remainder of the sentence succeeding the said semicolon is made a separate paragraph at the end of the two paragraphs which were interpolated. I drew myself the answer of the infant Henry W. Kingsbury to the cross-bill, and the allegations contained in the two printed paragraphs foregoing were not contained in the original cross-bill, but have since been introduced into the same. This copy was made after the filing of the original cross-bill, and about the time of filing the answer of Henry Kingsbury to the said cross-bill.

(Notarial seal.) (Signed) W. H. WHERLAND.

Subscribed and sworn to before me this 30th day of December, A. D. 1872.

SAMUEL W. SMITH,
Notary Public.

(*Record, pp. 201, 389, 390, 391.*)

The answer of Buckner and wife, filed at the same time with the cross-bill, and of Jane C. Kingsbury, drawn by the same counsel who drew the cross-bill, and filed November 22, 1870, ~~neither of them~~ contains the above paragraphs, and the bill of appellant charges that they were interpolated into the cross-bill after the decree of the Circuit Court dismissing the original and cross bills and before the filing of the transcript in the Supreme Court.

~~The above motion and affidavit were~~ filed in the Supreme Court, Central Grand Division, January 20, 1873, in a case entitled

"SIMON B. BUCKNER *et al.* } *Appeal from Cook on motion.*
vs.
"HENRY W. KINGSBURY." }

and are followed by a copy of the order of court February 13, 1873, overruling said motion. (*Record, p. 397.*)

The foregoing exhibits, which do not sustain the plea, together with an affidavit of Wm. C. Goudy, of the filing of the argument, "Exhibit D," in the Supreme Court on the 8th of October, 1872, were the only evidence offered by the appellees in support of their plea.

May 20, 1878, an order was entered as of April 27, 1878, vacating the order of April 27, and substituting John V. Le Moyne, who had been appointed guardian in place of Eva Lawrence, resigned, with authority to prosecute the suit, and giving said Le Moyne leave to file replication to answer of defendants. (*Record, p. 203.*)

July 19, 1878, the cause came on for final hearing before Henry W. Blodgett, District Judge, upon the pleadings and proofs, and, the death of Mary K. Buckner being suggested, it was ordered that the suit abate as to her; that the demurrers of the defendants Corydon Beckwith and of Jane C. Kingsbury be severally sustained. "And the court, having found the issue for the defend-"ants, Simon K. Buckner and Ambrose E. Burnside, on "the plea filed by them, and no replication having been "filed to their answer, it is further ordered, adjudged and "decreed, that the bill be dismissed for want of equity, "and that the guardian of the complainant, Henry W. "Kingsbury, pay the costs from funds belonging to his "ward." (*Record, p. 204.*)

December 12, 1885, Henry W. Kingsbury, the complainant and appellant in this suit, who had come of age within the two years then last past, filed his petition for an appeal to the Supreme Court of the United States from the decision entered herein July 19, 1878, which was allowed. (*Record, p. 206.*) At the October term, 1886, of this court, the death of Ambrose E. Burnside was suggested, and J. Howard Manchester, his administrator, made a party, who has been served with process.

ASSIGNMENT OF ERRORS.

"1. The Circuit Court erred in finding the issues for "the defendants, Simon B. Buckner and Ambrose E. "Burnside, upon the plea filed by them.

"2. The Circuit Court erred in finding that no repli- "cation had been filed to the answer of Simon B. Buckner "and Ambrose E. Burnside.

"3. The Court erred in decreeing that the bill should "be dismissed for want of equity.

"4. The Court erred in not entering a decree in "accordance with the prayer of complainant's bill.

"5. The Court erred in severally sustaining the de- "murrers of Corydon Beckwith and of Jane C. Kings- "bury."

Points made and authorities relied upon by appellant.

1.

"A minor may file a bill to impeach a decree pro- "cured by fraud, or for error appearing upon the face of "the decree."

Lloyd v. *Malone*, 23 Ill. 43.
Kuchenbeiser v. *Beckert*, 41 Ill. 172.
Hess v. *Voss*, 52 Ill. 478.
Lloyd v. *Kirkwood*, 112 Ill. 329.

Story's Eq. Pl., sec. 427.
Gooch v. *Green*, 102 Ill. 510.
Wright v. *Miller*, 1 Sandford, 120.

The demurrers admit the fraud, collusion and falsification of the record as charged, and should have been overruled.

2.

The original suit of Henry W. Kingsbury, of Newport, in the State of Rhode Island, an infant seven years and seven months of age, commenced by Corydon Beckwith, as his next friend, July 18, 1870, was instituted without authority of said infant, without filing the bond required by the statute, and gave the court no jurisdiction to pass upon his rights. (*Record, p. 30.*) Rev. Stat., 1845, chap. 47, sec. 13; *Lathers* v. *Fish*, 4 Lansing, 213: *Gray* v. *Larrimore*, 4 Sawyer, 638.

3.

The so-called cross-bill of Buckner and wife against Henry W. Kingsbury, was, in fact, an original bill. It was not germane to the original suit, and whether germane or not, the Circuit Court had no jurisdiction of the same without the service of process upon the minor. The appointment of Beckwith, guardian *ad litem* of the minor, who had no notice of the cross-suit, on motion of the complainants therein, was error, and did not give the Circuit Court jurisdiction to divest the minor of his real estate.

Campbell v. *Campbell*, 63 Ill. 462.
McDermaid v. *Russell*, 41 Ill. 490.
Hackenbotham v. *Blackledge*, 54 Ill. 316.
Wright v. *Miller*, 1 Sanford, 123.
Walker v. *Hallett*, 1 Ala. 379.
Graham v. *Sublett*, 6 J. J. Marshall, 45.

Buckner Et. al. vs Goodyear 9 Wall. 409

4.

The Supreme Court of Illinois in the Central Grand Division had no jurisdiction of the appeal from the decree of the Circuit Court of Cook County, except by consent of parties.

Art. 6, sec. 8, Constitution of 1870; Starr & Curtis's Stat. 131.

People v. *Supervisors*, 40 Ill. 125.

Owens v. *McKethe*, 5 Gil. 79

Goforth v. *Adams*, 11 Ill. 52.

5.

Neither an infant, nor his guardian *ad litem*, could by consent, confer jurisdiction on a court which would not otherwise have it.

Rhoads v. *Rhoads*, 43 Ill. 239.

Enos v. *Copps*, 12 Ill. 255.

Bank U. S. v. *Ritchie*, 8 Pet. 128.

Fischer v. *Fischer*, 54 Ill. 231.

1 Dan. Ch. Pr., star paging 170 and notes.

Wright v. *Miller*, 1 Sandford's Ch. Rep. 103.

6.

It was not competent for the guardian *ad litem* to waive the giving of an appeal bond, by the cross-complainants on their appeal to the Supreme Court. The giving of a bond is a prerequisite to the allowance of an appeal, and even if it were in the power of the guardian *ad litem* to waive it, the Supreme Court had no jurisdiction to entertain the appeal without such bond.

Rev. Stat., 1845, ch. 83, sec. 47.

Gross Stat., 1871, page 516.

Simpson v. *Alexander*, 5 Gilm. 260.

C. P. & S. W. R. R. Co. v. *Trustees*, 104 Ill. 91.

U. S. v. *Curry*, 6 How. 106.
The Lucy, 8 Wall. 309.
Washington Co. v. *Durant*, 7 Wallace, 694.
Villabolos v. *U. S.*, 6 How. 81.
Lewis v. *Shear*, 93 Ill. 121.
Page v. *The People*, 99 Ill. 418.
P. Ins. Co. v. *Foote*, 79 Ill. 361.

7.

The decisions of the Supreme Court of Illinois in assumed appeals from the decrees of the Circuit Court of Cook County, entered December 24, 1870, and August 2, 1872, and reported in 58 Ill. 310, and 70 Ill. 515, wherein the question of jurisdiction to entertain said appeals was not raised or passed upon by the court, cannot be set up in bar or be used as evidence against the appellant in this case, when it is made to appear that the Supreme Court did not have jurisdiction of said appeals.

Harris v. *Hardiman*, 14 How. 337.
Borden v. *Fitch*, 15 John. 141.
Hollingsworth v. *Barbour*, 4 Pet. 467.

8.

After the dismissal of the original bill by the Circuit Court of Cook County, November 13, 1871, the Circuit Court no longer had jurisdiction of said original suit or of the cross-suit, as such. No guardian *ad litem* of the minor was subsequently appointed, and all orders entered after that date in said original suit or said cross-suit, as such, were without jurisdiction and void.

9.

The exhibits offered in evidence by appellees, were inadmissible, and, if admitted, did not sustain the plea.

The Circuit Court inadvertently found that no replication was filed to the answers of *Buckner* v. *Burnside*. (*Record, p. 204.*) The replication is to be found. (*Record, p. 198.*)

10.

It was error for the guardian *ad litem* to waive any of the rights of the minor, or to allow the introduction of illegal and incompetent evidence in support of the cross-bill, without objection.

Cartwright v. *Wise*, 14 Ill. 417.
Fischer v. *Fischer*, 54 Ill. 231.

The testimony of Simon Buckner and Jane C. Kingsbury, parties to the cross-bill, and interested in the result of the suit, and upon which the Supreme Court based its decision, was incompetent, and it was the duty of the guardian *ad litem* to have objected to the same.

Laws 1867, 183, sec. 2.
Gross' Stat., 1871, 274.
Fischer v. *Fischer*, 54 Ill. 235.
Reeves v. *Herr*, 59 Ill. 81.

11.

The whole record shows that the rights of the minor were not presented to the court; that the decree against him upon the cross-bill was the result of negligence; that the entire proceedings in both the Circuit and Supreme Courts were a contrived case, carried on by the waiver of the infant's rights, and are not binding upon the infant, because "there was no earnest controversy."

Gaines v. *Relf*, 12 How. 537, 539.

12.

The decision of the Supreme Court of Illinois, 58 Ill. 310, was obtained by fraud upon a falsified record and should be set aside, and with it all decrees entered by the Circuit Court of Cook County in pursuance of such decision.

ARGUMENT.

An infant, who is aggrieved by the decree of a court of chancery, may file an original bill for redress, and is not bound to proceed by way of rehearing or bill of review; nor is he limited to attack upon the decree for fraud, but he may assail it for error merely. The right of a minor to maintain a bill of this character was settled in Illinois in the case of *Lloyd* v. *Malone*, 23 Ill. 43, decided in 1859, where the authorities are reviewed in the case of a bill filed to impeach and set aside a decree of the Circuit Court, directing the sale of certain lands, the property of the infant complainants. The court said:

"On the argument we had doubt, and much of it was "directed to this point, if an original bill could be filed "like this, attacking the order of partition and sale, and a "decree had to set it aside. We have examined the ques- "tion fully, and are well satisfied the bill can be maintained. "In the case of *Richmond and Wife* v. *Tayleur*, 1 Peer "Williams, 734, Lord Chancellor Macclesfield held, that, "where an infant conceives himself agrieved by a decree, "he is not under a necessity to stay till he becomes of age "before he seeks redress, but may apply for that purpose "as soon as he sees fit; neither is he bound to proceed "by way of rehearing or bill of review, but may impeach "the former decree by an original bill, in which it will be "enough for him to say the decree was obtained by fraud

" and collusion, or that no day was given him to show cause against it." * * *

So, in Mitford's Pleadings, 113, it is said, " where an " improper decree has been made against an infant, with- " out actual fraud, it ought to be impeached by original " bill."

The court then refers to numerous other authorities, and say: " We are inclined to go to the extent of the ruling " of the English courts, and not confine the right to cases " where fraud has intervened to obtain a decree against " infants. The rule in *Richmond* v. *Tayleur*, 1 P. Will- " iams, 734, and recognized by Mitford, is a just rule, and " we cannot anticipate any evils in its application, in this " State, to cases as they may arise."

This case has been followed by numerous other cases in Illinois, and is the settled law of that State.

Kuchenbeiner v. *Beckert*, 41 Ill. 172.
Hess v. *Voss*, 52 Ill. 478.
Gooch v. *Green*, 102 Ill. 510.

In *Lloyd* v. *Kirkwood*, 112 Ill. 329, decided in 1884, which was a bill to set aside a decree entered against an infant establishing a trust in certain real estate belonging to the ancestor of the infant, wherein the guardian *ad litem* of the infant had failed to set up in his answer, and interpose the defense of laches in behalf of the infant, the court sustained the bill and set aside the decree establishing the trust. In deciding the case the court, at page 337, said : " The authorities are universally agreed that " a decree against an infant may be attacked for fraud, " and this is conceded by appellees; but they are not so " agreed where the decree or judgment is assailed for " error, merely. Upon this proposition there is consider-

"able diversity of opinion. By the law as it is judicially "declared in England, and in many of the States here, a "decree against an infant is not absolute in the first in- "stance. It is binding *sub modo* only. On becoming of "age he is entitled to his day in court to show cause "against the decree, and his right to do so must be ex- "pressly reserved by the decree itself, otherwise, it would "be erroneous, and subject to be reversed and set aside. "In many of the States, however, including our own, a "decree against an infant like that against an adult, is "absolute in the first instance, subject to the right "to attack it by original bill, for either fraud or error, "merely; but until so attacked, and set aside or reversed, "on error or appeal, it is binding to the same extent as any "other decree or judgment. This right to attack a decree "by original bill may be exercised at any time before the "infant attains his majority, or at any time afterwards "within the period in which he may, under the statute, "prosecute a writ of error for the reversal of such decree." And after referring to various authorities in support of the proposition that an original bill will lie to impeach a decree against an infant for mere error, the court say, page 338: "The rule here adopted, upon a deliberate consid- "eration of the authorities on both sides of the question, "has been frequently recognized by this court, and what- "ever the rule be elsewhere, it must be regarded as settled "in this State." The defense of laches was not interposed by the guardian *ad litem* in this case, although nearly eight years elapsed between the death of the infant's father and the filing of the cross-bill by the Buckners, claiming the trust, during which time the minor was in possession, receiving the rents.

It remains only to show that in the proceedings and

decree entered upon the cross-bill, fraud or error intervened. The bill of appellant not only points out errors in the decree and proceedings upon the cross-bill, but charges fraud and collusion, as well as want of jurisdiction in the Circuit and Supreme Courts. The demurrers of Corydon Beckwith and Jane C. Kingsbury admitted these allegations to be true, and it was error to sustain them.

II.

The Circuit Court had no jurisdiction of the original bill of Henry W. Kingsbury, by his next friend, Corydon Beckwith, filed July 19, 1870. The statutes of Illinois declare that, "Suits in chancery may be commenced and prosecuted by infants, either by guardian or next friend." * * * * "And that minors may bring suits "in all cases whatever, by any person that they may select "as their next friend; and the person so selected shall file "bond with the clerk of the Circuit Court or justice of the "peace before whom the suit may be brought, acknowl- "edging himself bound for all the costs that may accrue "and legally devolve upon such minor. And after bond "shall have been so filed, said suit shall progress to final "judgment and execution, as in other cases."

Revised Statutes, 1845, ch. 21, sec 4, and ch. 47, sec. 13.

The record in this case does not show any selection by the minor of Corydon Beckwith as his next friend, or how he became such, nor does it appear from the record that Beckwith filed bond, which, by the statute, was made a prerequisite to the progress of the suit.

There is nothing to show that Beckwith had any authority to act as the next friend of the minor, except that he states himself such in an affidavit.

It was held by the Supreme Court of New York in the case of *Lathers* v. *Fish*, 4 Lansing, 213, that a similar statement by a guardian does not show "that he has any authority in relation to the matter in dispute."

III.

The cross-bill of Buckner and wife was not germane to the original bill, but presented new issues. The original bill sought but one object, that of removing a supposed cloud upon the minor's title, by reason of the probate and record of an alleged will. The bill of the cross-complainants, not only insisted upon the validity of the will, but sought to set aside a deed made by them to the father of the complainant in the original bill, upon the alleged ground that it was made in trust for them, prayed for a partition of the real estate, assignment of dower, an accounting for receipts and expenditures while the property was in possession of complainant in original bill, the adjusting of incumbrances upon the property, etc. No notice was given the minor of the filing of the cross-bill, Oct. 31, 1870, the same day the cross-complainants filed their answer. Beckwith was appointed guardian *ad litem* of the minor, Nov. 25, 1870, on motion of the complainants in the cross-bill. The statute which declares that "in any cause in equity, it shall be lawful for the "court in which the cause is pending to appoint a guardian "*ad litem*, of an infant or insane defendant in such cause, "whether such infant or insane defendant shall have been "served with process or not" (Rev. Stats., 1845, ch. 21, sec. 47), was held to be unconstitutional by the Supreme Court, in the case of *Campbell* v. *Campbell*, 63 Ill. 462, so far as it authorized a decree against infant defendants, without service of process on them, and it was said that

the court had no jurisdiction of the persons of such defendants, for whom the court had appointed a guardian *ad litem*, and that it was not competent for the legislature to authorize the court to take the title of any one without notice, actual or constructive, to appear and defend. The court refers to various decisions in Illinois, where it had been held that infant defendants must be served before the court could acquire jurisdiction over them. If it was necessary for the protection of the minor's rights that a guardian *ad litem* should be appointed for him, the court had no jurisdiction under the statutes in Illinois, to make such an appointment, until the minor had been served with process.

In *McDiemann* v. *Russell*, 41 Ill. 490, it was held that the appointment of a guardian *ad litem* for non-resident infant defendants, who had not received due notice by publication, was void, and that they could not be brought into court by a stipulation of attorneys.

Walker v. *Hallett*, 1 Ala. 379.
Graham v. *Sublett*, 6 J. J. Marshall.

IV.

The State of Illinois is divided into three Grand Divisions, denominated "Southern, Central, and Northern." (Constitution of 1870, art. 6, sec. 5; Starr & Curtiss, Annotated Statutes, 130). And by Sec. 8, it is declared "that appeals and writs of error may be taken to "the Supreme Court held in the Grand Division in which "the case is decided, or by consent of the parties, to any "other Grand Division."

The County of Cook is situated in the Northern Grand Division, and an appeal from a case decided in that county could only be taken to the Central Grand

Division by consent of parties. The record shows the entry of the decree of the Circuit Court of Cook County, December 24th, 1870, by which both the original and cross-bills were dismissed, without prejudice, and an order entered that "Thereupon, the complainant in the original "bill, by his next friend, Corydon Beckwith, prayed an ap- "peal to the Supreme Court, and a bond being waived "by the other parties, such an appeal is allowed." And "Thereupon, the complainants in the cross-bill prayed an "appeal to the Supreme Court, and a bond being waived "by the other parties, such appeal is allowed. And the "parties aforesaid, in open court agree, that such appeals "may be prosecuted to, and the record filed in, the Central "Grand Division, at its next term, and that one record "may be used for both appeals." (*Record, p. 265.*)

By the constitution, jurisdiction of the Supreme Court is exclusive in each grand division, and it was so held in *People* v. *Supervisors*, 40 Ill. 125. The constitution of 1848 (art. 5, sec. 3 and 32, Starr & Curtiss' Stat. 78–82) was similar in its provisions to that of 1870, in regard to the jurisdiction of the Supreme Court in the different grand divisions. In the case of *Goforth* v. *Adams*, 11 Ill. 52, a writ of error had been sued out to the Circuit Court of St. Clair County, to a different grand division from that in which St. Clair County was situated. On motion, the writ of error was dismissed. The court said: "This court has no jurisdiction of the case." *Owen* v. *McKethe*, 5 Gilman, 79, is to the same effect.

V.

It was not competent for the next friend, or the guardian *ad litem*, to take or consent to the taking of the appeals to the Central Grand Division, and his consent

gave the Supreme Court in that grand division no jurisdiction of them. A guardian *ad litem* cannot bind the infant by anything he may do. An infant is not bound by his waiver of service of process, nor does he lose his right to object to the jurisdiction at the hearing, on the ground that the remedy is at law, although his guardian *ad litem* has omitted to raise such objection in the answer. No courts have taken stronger grounds for the protection of the interests of infants, or enforced more strictly the rule that a guardian *ad litem* cannot admit away any of his rights than those of Illinois. In *Rhoads* v. *Rhoads*, 43 Ill. 249, Mr. Justice BREESE, in delivering the opinion of the court, said:

"The rule is inflexible in this State, that the guardian "*ad litem* shall make a defense of the interests of the "infant as vigorous as the nature of the case will admit "(*Sconce* v. *Whitney*, 12 Ill. 150; *Enos* v. *Capps*, id. 255.) "It is understood to be the special duty of such guardian "to submit to the court, for its consideration and decision, "every question involving the rights of the infant affected "by the suit. This is the scope of the decisions in those "cases above referred to, and is so distinctly announced "in *Dow* v. *Jewell*, 1 Foster (N. H.), 486, and in *Knickerbocker* v. *DeForest*, 2 Paige, 304, cited *supra*. A bill "cannot be taken as confessed against infants under any "circumstances, nor their interests decreed away without "an answer by the guardian *ad litem*, or on full proof. "Nor can a default be entered against them. (*McClay*, "*Administrator* v. *Norris*, 4 Gilm. 370; *Cost* v. *Rose*, "17 Ill. 276; *Chaffin* v. *Heirs of Kimball*, 23 id. 36.) "And it is further held, that nothing can be admitted, "but everything must be proved against an infant. (*Hitt* "v. *Ormsbee*, 12 id. 166; *Hamilton* v. *Gilman*, id. 260;

" *Tuttle* v. *Garrett*, 16 id. 354; *Reddick* v. *President of* " *the State Bank*, 27 id. 148.) And strict proof is " required, and the record must furnish proof to sustain a " decree against them, whether the guardian *ad litem* " answers or not. (*Masterson* v. *Wiswould et ux.*, 18 id. " 48; *Chaffin* v. *Heirs of Kimball*, *supra*; *Tibbs* v. *Allen*, " 27 id. 129.) "

VI.

The record shows the allowing of an appeal to the cross-complainants by the consent of the guardian *ad litem*, without bond—an essential to give the Supreme Court jurisdiction—except in certain cases of which that of the cross-complainants is not one, the Supreme Court has appellate jurisdiction only, and that jurisdiction is wholly dependent upon the constitution and statutes of the State. The statute regulating appeals in force when the cross-complainants prayed their appeal from the decree of December 24, 1870, is as follows:

" Appeals from the circuit courts to the Supreme " Court shall be allowed in all cases where the judgment or " decree appealed from be final, and shall amount, exclu- " sive of costs, to the sum of twenty dollars, or relate to a " franchise or freehold: *Provided*, such appeals be prayed " for at the time of rendering the judgment or decree, and " provided the party praying for such appeal shall, by " himself or agent or attorney, give bond with sufficient " security, to be approved by the Circuit Court, and filed " in the office of the clerk of the Circuit Court within the " time limited by the court; which bond shall be in a " reasonable sum, sufficient to cover the amount of the " judgment appealed from and all costs, and conditioned " for the payment of the judgment, costs, interest and " damages, in case the judgment shall be affirmed, and

" also for the due prosecution of said appeal." (R. S. 1845, ch. 83, sec. 47).

Under the above statute the allowance of an appeal was conditioned upon the giving of a bond, with security, to be approved by the Circuit Court, and filed in the office of the clerk. It was competent for the Legislature to prescribe the terms on which appeals should be allowed, and having done so, neither the parties, nor the court, could dispense with them, and most assuredly a guardian *ad litem* could not do so. That the giving of the bond was jurisdictional was held in *Simpson* v. *Alexander*, 5 Gilm. (10 Ill.) 260.

In *C., P. & S. W. R. R. Co.* v. *Trustees*, 104 Ill. 91, the appellees had waived the giving of an appeal bond. The appellee moved the Supreme Court to affirm the judgment, or that the appeal be dismissed. In disposing of the motion, the Supreme Court said:

" The waiver by the appellee of the appeal bond did " not operate to perfect the appeal for any purpose, either " to make it incumbent upon the party praying the appeal " to prepare the cause for a hearing at the present term, " or to suspend the judgment in the court below. The " parties are in precisely the same attitude they were " before that waiver was filed. There is no appeal here " for us to act upon, nothing to dismiss. The case will " be stricken from the docket."

Until the record shows, in some manner, that the party is entitled to an appeal, as prescribed by the statute, the Supreme Court is unable to take jurisdiction.

Lewis v. *Shear*, 93 Ill. 121.

These cases would seem to settle the question, that the Supreme Court did not have jurisdiction of the

appeals from the decrees of the Circuit Court of December 24, 1870, and if so, neither the opinion of the court, nor its decisions can be pleaded in bar, or used as evidence against the appellant in this case. They are nullities. The question of jurisdiction was not passed upon by the Supreme Court, or brought to its notice by the guardian *ad litem*, as it was his duty to do. He had no authority to waive the bond, and his having done so, did not give the court jurisdiction of the appeals, and simply tends to show his readiness to accommodate cross-complainants.

The Supreme Court of Illinois only notices the errors assigned upon the record. It is not authorized to pass upon an error not assigned.

Page v. *The People*, 99 Ill. 418.
Protection Life Ins. Co. v. *Foote*, 79 Ill. 361.
I. B. & W. Ry. Co. v. *Rhodes*, 76 Ill 285.

This court has in several decisions recognized the same rule governing appeals as that established by the courts of Illinois. In the case of *Villabolos* v. *United States*, 6 Howard, 81, the court held that an appeal could only be taken in the mode prescribed by the acts of Congress, and that an appeal in any other mode was a nullity. In the *United States* v. *Curry*, 6 Howard, 106, it was held that appeals were "regulated by acts of Congress, which the courts can neither change nor modify." In disposing of the motion in that case to dismiss for want of jurisdiction, the court, page 113, said: "The power of "hearing and determining a case like this, is conferred "upon the court by acts of Congress, and the same "authority which gives the jurisdiction, has pointed out "the manner in which the case shall be brought before us."

" provisions, nor to change or modify them." The case was accordingly dismissed.

In the case of The Lucy, 8 Wallace, 307, the syllabus of the case states: " Appellate jurisdiction in the Federal " courts depends upon the constitution and the acts of " Congress. When these do not confer it, courts of the " United States cannot exercise it by virtue of agreements " of counsel or otherwise." The appeal was dismissed for the reason that the transcript of the record was not filed within the time required by act of Congress, although all parties consented to have the case come before this court.

In the case of *Washington County* v. *Durant*, 7 Wallace, 694: " The record showed that this cause had been " brought here from the Circuit Court for Iowa, as on " a writ of error, *by agreement of parties, and without the* " *issuing or service of such a writ.* Coming before this " court on a printed argument for the defendant in error, " and the fact above mentioned being observed by the " court, the appeal was DISMISSED. The chief justice " stating it to be the opinion of the court, that an ap- " peal allowed or a writ of error served, was essential to " the exercise of its appellate jurisdiction."

Had the fact been brought to the notice of the Supreme Court of Illinois, that the appeal by the cross-complainants, from the decree of December 24, 1870, had been brought before it in the Central Grand Division by consent of the guardian *ad litem*, and without bond, it would undoubtedly, in accordance with the well settled law of the State, and the rulings of this court in like cases, have refused to entertain it.

VII.

That a judgment or decree rendered by a court without jurisdiction is a nullity, is a proposition too plain for argument. "The want of jurisdiction is a matter "that may always be set up against a judgment when "sought to be enforced or when any benefit is claimed "under it. The want of jurisdiction makes it utterly void "and unavailable for any purpose." *Borden* v. *Fitch*, 15 John. 141, cited with approval in *Harris* v. *Hardiman*, 14 How. 339. Without jurisdiction a court cannot make a record.

Gray v. *Larrimore*, 4 Sawyer 638.

VIII.

No appeal was prayed or allowed from a decree of the Circuit Court of August 2, 1872, as alleged in the plea of appellees (*Record, p. 186*). The transcripts of records offered in evidence by appellees contain no record of a decree or order of the Circuit Court entered August 2, 1872, and the finding of the issue for the defendants, Simon B. Buckner and Ambrose E. Burnside, on the plea filed by them, alleging such a decree, and an appeal from the same was manifestly erroneous.

None of the exhibits offered in evidence by appellees were admissible—if admitted they did not sustain the plea.

It seems to have been assumed by all parties, as the plea alleges, that on the 31st day of December, 1870, the cause upon the original and cross-bills came "on to a "hearing on the pleadings and evidence, and a decree was "thereupon rendered by said court as of the 24th day of "the same month." (*Record, p. 183.*) The record offered in evidence states that the cause came on for hearing on December 24, 1870, and not December 31st, as alleged. (*Record, p. 265.*)

The plea alleges that in the appeal by the said Henry W. Kingsbury the appellant assigned for error that the "Circuit Court erred in dismissing the cross-bill without prejudice." The record offered in evidence contains no such assignment of error. (*Record, p. 353.*)

The plea alleges that October 31, 1871, "the said cause was redocketed in the Circuit Court upon the mandate of the Supreme Court being filed." The record given in evidence fails to show a redocketing of the case at that time; but on the contrary the only evidence of the filing of the mandate, and redocketing of the case, at any time, is to be found in the decree entered November 13, 1871, of which it does not appear that the guardian *ad litem* had notice, nor did he appear at the time said mandate was filed and the decree was entered. My associate, whose brief was hastily prepared to meet the rules of the court, inadvertently refers to an appeal from the decree entered November 13, 1871. The record shows that there was no appeal from that decree. (*Record, p. 358.*). The plea alleges that on the 11th day of September, A. D. 1872, the said Henry W. Kingsbury, appellant, filed in said Supreme Court a transcript of the record of said Circuit Court in the said cause, and thereupon made an assignment of errors thereon. (*Record, p. 186.*) The record fails to show a transcript of any such record.

The plea states that on or about the 24th of May, 1873, the Supreme Court overruled a motion to set aside a judgment of reversal, etc., and rendered its decision in said cause, whereby it decided "that there was no error "in said decree, except that the Circuit Court erred in "finding that said Mary K. Buckner had any interest in "the said so-called Spencer tract, and in decreeing par-"tition thereof, and for that reason the said Supreme

" Court revised the said last decree of the Circuit Court, " and remanded the said cause to said Circuit Court." The record shows no such decision of the Supreme Court, as stated, but it does contain the copy of an order entered February 13, 1873, in a case " entitled *Simon B. Buckner et al*, v. *Henry W. Kingsbury*, appeal from Cook County on motion," in the following words: " And on this day came " said parties, and the court being sufficiently advised of, " and concerning the premises herein, does order that the " motion to set aside the former judgment made herein " be, and the same is hereby overruled," which is the entire order entered upon said motion. (*Record, p. 395.*)

The Supreme Court, doubtless, overruled the motion for want of jurisdiction of the same.

IX.

It was error for the guardian *ad litem* to waive due notice of taking depositions, and not to object to the evidence of Simon Buckner and Jane C. Kingsbury, parties to the cross-bill, and interested in the result of the suit, and who testified of their own motion adversibly to the infant. The Supreme Court in its decision, 58 Ill. pages 325 and 334, lays special stress upon the testimony of these witnesses. They quote the conversation between Buckner and the father of appellant, stated by Buckner to have occurred in July, 1861, nine years previously, wherein Buckner testifies in his own behalf that he remarked to the father of appellant: " By the way, the property of your sister has been " deeded to you, and I want you to look after her interest " and see that she has her property; " and he remarked, " That was all right, or very well, or some words to that effect." (*Record, p. 291*). In referring to Mrs. Kings-

bury's testimony, the Supreme Court says: "She inquired "of him (appellant's father), whether his sister's property "had been turned over to him, telling him that Simon had "told her so. 'He replied: That is so, but don't look "concerned. It is only turned over to me for safe keep- "ing. It will be restored to her.'" (*Record, p. 318.*)

The conversation with Mrs. Kingsbury is stated by her to have occurred in August or September, 1861. Sec. 2 of the Act of February 19, 1867, Laws of 1867, p. 183; Gross' Statutes, 1871, p. 274, is as follows: "No "party to any civil action, suit or proceeding, or person "directly interested in the event thereof, shall be allowed "to testify therein of his own motion, or in his own "behalf, by reason of the foregoing section, when any "adverse party sues or defends as the trustee or conserva- "tor of any idiot, lunatic, or distracted person, or as the "executor, administrator, heir, legatee, or devisee of any "deceased person, or as guardian or trustee of any such "heir, legatee, or devisee, unless when called as a witness "by such adverse party so suing or defending;" except in certain cases not applicable to Buckner or Mrs. Kings bury. Neither of them was called as a witness by the guardian *ad litem*, nor were they cross-examined by him, nor did he object to their testimony. Beckwith was appointed guardian *ad litem* by the court, November 25, 1870. (*Record, p. 252.*) Three days before that, to wit, Nov. 22, 1870, he gave his consent to the suing out of a *dedimus postestatum*, Nov. 30, 1870, to take the deposition of said Buckner, waiving the longer notice required by the statute, which was ten days. The dedimus was in fact issued Nov. 29th, instead of 30th. (*Record, pp. 98–99.*) That Buckner's testimony and that of Mrs. Kingsbury were improperly received under the laws of Illinois, is

settled by the decision of the Supreme Court, in the case of *Fischer* v. *Fischer*, 54 Ill. 235, where the court, in commenting upon the duties of a guardian *ad litem* to defend vigorously the interests of the infant, his inability to admit away any of his rights, and the competency of witnesses, say: "A guardian was appointed by the court for "this infant, and he put in a mere formal answer, but did "not defend vigorously the interests of the infant. He did "not attend the examination of the witnesses, or make "objection to the testimony of complainant or to the affi- "davit of Christina Wiemuller, taken without authority, "and by a person having no power to take it. The "record does not show that M. W. Weir was appointed a "special master by the court to take testimony, and it was "not competent for the infant to consent thereto, nor for "the guardian *ad litem* in his behalf. This person cannot "admit away any of the rights of an infant, or bind "him by consent to an act which may be prejudicial to "the infant. The record seems to show a contrived case "by which this infant, 'muling and puking in his nurse's "arms'—the only heir-at-law of his deceased father, in "whom the legal title to this lot had been legally placed— "was to be deprived of his estate by the combination of "complainant and his mother, Christina Wiemuller. "The complainant was not a competent witness to prove "his own case, not having been called by the adverse "party to testify. He was incompetent at common law, "*Mixell* v. *Lutz*, 34 Ill. 382—and also by the terms of the "second section of the statute relating to the competency "of witnesses in civil cases—Sess. Laws, 1867, p. 183— "not being within any of the exceptions of that act. The "court erred in rendering a decree on complainant's testi- "mony. The testimony of the other witness was not

"taken under the order of the court; and the guardian "*ad litem* had no power to consent to its being taken as "against the infant."

In the case of *Cartwright* v. *Wise*, 14 Ill. 418, where an interested witness had been permitted to testify to the prejudice of an infant, and the guardian *ad litem* had raised no objection to his competency, the court said: "But this cannot prejudice the rights of the infant whom "he represented. The guardian could waive none of "his rights." * * * "He who prosecutes an "infant or an idiot, must see to it that he makes out a "proper case, and by competent proof before he can "expect a decision in his favor."

X. AND XI.

The record shows that the original and cross-bills were a contrived and not a real case. That there was no occasion for filing the original bill by Beckwith, as the next friend of the minor, is apparent from the fact that the statute gave the minor, who was born after his father's death, and for whom no provision had been made in the will, the same estate as if there had been no will, and so the Supreme Court held, and directed his bill to be dismissed absolutely, which it could not have done if the will was a cloud upon the minor's title, for, it is not questioned that the minor was entitled to one-half of the real estate of which his father died seized, and the will, if a cloud upon anything, would have been a cloud upon his interests. In disposing of the original bill, the court says: "If properly executed and admitted to probate the will "would be governed by the laws of this State, where the "property is situated; and the posthumous birth of infant

"Henry W. Kingsbury, would, by those laws, operate as "an abatement of all devisees of property so situated."

That no process was sued out upon the original bill, or steps taken to bring the defendants into court; that Buckner and wife subsequently entered their appearance, and on the same day filed a cross-bill, none of the other parties to the suit at that time having appeared; that no process was sued out, or steps taken to bring the parties to the cross-bill into court, but that they all, subsequently, voluntarily appeared; that Beckwith was appointed guardian *ad litem* for the minor defendant to the cross-bill on motion of the complainants; that he failed to set up laches of the cross-complainants in lying by from September, 1862 to the 31st of October, 1870, during which time the minor was in possession of the entire estate, receiving all the rents and profits without taking any steps to enforce the pretended trust; that he waived notice of the taking of depositions; that he filed no cross-interrogatories to witnesses; that he made no objection to incompetent testimony; that he consented to an appeal without bond, and to a different grand division from that to which an appeal could have been taken without such consent, that he assigned no error upon the appeal of the cross-complainants; that he failed to bring to the notice of either the Circuit or Supreme Court objections to incompetent testimony; that he consented to go to a final hearing December 24th, on the very day that replication was filed to the answer of the cross-complainants; that he allowed a case of such importance to be disposed of by the Circuit Court within less than sixty days from the time of the filing of the cross-bill without taking the time for its consideration given by the statute, which declares "that after replication is filed, the cause shall be deemed

Pacific R. R. of Mo. v. *Missouri Pacific Ry.*, 111 U. S. 505, was the case of a bill filed to set aside a decree of foreclosure of the Circuit Court of the United States for Missouri, which had been affirmed by this court, alleging fraud in fact in the foreclosure suit, in the conduct of the solicitor and directors of the corporation defendant in that suit, and praying that the decree which had been affirmed by this court, be set aside.

A demurrer was sustained to the bill in the Circuit Court. This court, in disposing of the case on appeal, said:

"It appears from the report of the case in 101 U. S. 289, that the present plaintiff contended here, that it had not consented to the decree, and sought to examine the question of the alleged fraud or unauthorized conduct of its solicitor and its officers, and also sought to defeat the jurisdiction of the Circuit Court, and to attack the propriety of the purchase by the solicitor. The conclusion of this court was, that it could not discover any error that could be corrected by appeal. But, in its opinion, it said: 'The remedy for the fraud or unauthorized conduct of a solicitor, or of the officers of the corporation, in such a matter, is by an appropriate proceeding in the court where the consent was received and acted on, and in which proof may be taken and the facts ascertained.' Thereupon this bill was immediately filed."

The court then say:

"On the admitted allegations of the bill, there was no real defense made in the Ketchum suit, and the present plaintiff was prevented from making that defence by the unfaithful conduct of its solicitor and its directors, and the directors of the Atlantic Company. A case of that kind is one of which a court of equity will take cognizance,"

and proceed to remand the case that the matters alleged may be inquired into and adjudicated.

at issue, and stand for hearing at the next term." (Gross' Statutes of 1871, page 73), and that he failed to apply for a rehearing in the Supreme Court, are all circumstances which go to show that the case was not a real controversy; and if not a real controversy, the proceedings are not admissible in evidence against the minor. In the case of *Gaines* v. *Relph*, 12 Howard, 537, Gaines and wife set forth the decree made in their behalf by the Supreme Court at a former term as having adjudged and decided against all the defendants to the suit then pending, that Myra Clark Gaines was the legitimate child and forced heiress of Daniel Clark, and that she was legally and equitably entitled to receive of Relph and Chew and all persons holding under them, the estate claimed by the original bill. The defendants admitted the rendition of the decree, but denied its conclusiveness on them, because they said:

"The decree was brought about and procured by imposition, combination and fraud between the complainants and Charles Patterson, and that therefore it should not be regarded in a court of justice for any purpose whatever. That said decree was designed as no honest exposition of the merits of the case, but was brought about, allowed and consented to for the purpose of pleading the the same as *res judicata* upon points in litigation not honestly contested." Evidence was received upon this point, and the Supreme Court held that the decree of that court in Charles Patterson's case did not affect the defendants, giving as one reason that "it was no earnest controversy." The decisions of the Supreme Court offered in evidence in this case cannot affect the appellant, for the same reason, and for the further reason that the Supreme Court had no jurisdiction of the appeal from the decision

of Dec. 24, 1870, for two reasons: 1. Because no bond was given as required by the statute. 2. Because said appeal was taken to a grand division to which the law would not permit it to be taken, without consent of parties, and the guardian *ad litem* had no power to give such consent. The opinion and decision of the Supreme Court reported in the 70 Ill. 514, cannot be used as evidence against appellant for the reason that the record contains no evidence of an appeal from the decree therein referred to, and so far as appears no appeals were ever perfected to the Supreme Court from any decree or order referred to in the opinion in that case. The court say: "No appeal "was taken from the decree of November 13, 1871, but "appeals were taken from some of the decretal orders in- "tervening that and the final decree of August 2, 1872." The record contains no final decree, nor any decree of August 2, 1872, nor is there an assignment of errors upon any such decree.

"Upon these appeals, say the court, the whole record "was brought to this court, and errors assigned, question- "ing the propriety of the decree of November 13, 1871, "entered in conformity with the directions of this court, "some of the intervening orders, and the final decree of "August 2, 1872. The questions raised and attempted "to be raised, were all carefully considered, and the con- "clusion arrived at was, that no error could be assigned "upon the first decree entered in pursuance of the "directions of this court; that the points made upon the "intervening orders were not well taken, but that the "decree of August 2, 1872, was erroneous, and ought to "be reversed, for the reason given in the opinion. These "views, however, are not clearly announced in the former "opinion, and it follows also, that the directions contained

"in the opinion which have no relation to the matters "involved in the decree of August 2, 1872, are wholly "inappropriate, and may be considered as withdrawn "from the opinion."

"The judgment which we intended to enter was, that "the several decrees and decretal orders antecedent to the "final decree of August 2, 1872, and upon which error "was assigned, be affirmed, but that the decree of August "2, 1872, concerning Mrs. Buckner's claim in the Spencer "tract, be reversed, and the cause remanded for further "proceedings in conformity with the former opinion, as "herein explained and modified, and that each party pay "half of the costs in this court."

In the same opinion, the court say: "A labored "argument has been made to prove the error of the for- "mer decision of the court, and it is charged that fraud "and collusion were accomplished, and incompetent testi- "mony introduced to obtain it."

"If this were true, we cannot determine questions so "grave upon *ex parte* affidavits. If there have been fraud "and collusion, the proper remedy would be in chancery, "and then the parties assailed could have an opportunity "of making a defense; or, if the decree is directed by the "court of final resort, by an application for a rehearing."

* * * "We cannot examine as to the "merits of the original case, but only as to proceedings "subsequent to the proceedings of the former hearing." This shows that the Supreme Court, in overruling the motion made January 20, 1873, to set aside and annul the judgment of said court, rendered at the January term, 1871, and recall the mandate and dismiss the appeal, because the said appeal and judgment and mandate had been fraudulently procured from the court upon a forged and fraud-

ulent record, and by fraudulent practice and deceit practiced upon the court and without jurisdiction of the subject matter or of the parties of said pretended appeal, did so, because it had no jurisdiction over said motion.

The only appeals shown by the record to have been taken and perfected by any of the parties prior to the one now before this court, were the consent appeals taken without bond from the consent decree of Dec. 24, 1870. All other cases, of which the Supreme Court took cognizance were pretended appeals when none in fact existed. How the Supreme Court could have been misled into rendering decisions, reversing decrees that never existed, it is perhaps not material to inquire. It is enough, if it can be shown that its decision was given in a matter over which it had no jurisdiction. Its decision upon the rehearing granted appellees quoted *ante*, affirming all decrees and decretal orders antecedent to the final decree of Aug. 2, 1872, and reversing that of Aug. 2, 1872, when no such decrees were before it, is not more remarkable, than the decree caused by the appellees, six years afterward, to be entered by the Circuit Court, professedly in obedience to the mandate and directions of the Supreme Court Instead of affirming all orders antecedent to Aug. 2, 1872, as directed, the Circuit Court sets aside such orders. (*Record, p. 393*).

The decision of the Supreme Court upon the appeal of the cross-complainants from the decree of December 24th, 1870, was based upon a record that had been altered and changed after the issues were made up and without the consent of the court. With the motion filed by the minor in the Supreme Court, Central Grand Division, was an affidavit by W. H. Wharland, showing that important interpolations were made in the cross-bill after issue joined. This motion and affidavit were introduced by

appellees in support of their plea for another purpose, but being in evidence, the appellant is entitled to the benefit of the affidavit. The facts stated in the affidavit are not controverted, and could not well be, when the opportunity which the person making it had for knowing the facts are considered. (*Record, p. 389.*)

They are also corroborated by other parts of the record. The counsel of the complainants in the cross-bill were also the counsel of Jane C. Kingsbury, to whom it is alleged in the cross-bill, filed October 31, 1870, as presented to the Supreme Court, a letter was written by appellant's father, October 23, 1861, in which, together with the conversation had with her, it is alleged that appellant's father had expressly admitted that he held the property inherited by Mary K. Buckner from her father in trust to be restored to her whenever she desired. In Jane C. Kingsbury's answer to the original bill, filed November 22, 1870, no allusion is made to this letter or conversation. In her testimony taken in Lyme, Conn., December 20, 1870, she swears "I cannot recollect com-"municating it (the letter of October 21, 1870) to any "person till now." (*Record, p. 321.*) And yet the letter, verbatim in part, and the conversation are set forth in the cross-bill filed nearly two months before. (*Record, p. 248.*) Is it not incredible that the attorneys who drew the cross-bill, and three weeks afterward Mrs. Kingsbury's answer, claiming half the property for Mrs. Buckner, the validity of the will, and that the property was held in trust by appellant's father, should have omitted from the answer all allusion to so important a matter as this letter and conversation? The undisputed testimony of Whetland, together with the circumstances disclosed by the record, show that there was interpolated

into the cross-bill after the issues were formed, without leave of court, important allegations upon which the case was made to turn in the Supreme Court. Can it be that a decision of the Supreme Court founded upon a record thus tainted, and upon which the Circuit Court never passed, can be set up as a bar to deprive an infant of his estate? It is apparent that no hearing was ever had in the Circuit Court. The *guardian ad litem* consented to a decree dismissing the cross-bill without prejudice, and to an appeal without bond. The only error of which he could complain upon such a record was the dismissal without prejudice, instead of absolutely, and that he failed to assign. Could a more cunningly devised scheme have been invented to deprive an infant of his estate without a hearing? All that is asked in this case is, that the appellant may have an opportunity to present his defense to the cross-bill, which the record shows he has never yet had.

LYMAN TRUMBULL.
(with John P. Wilson),
of Counsel for Appellant.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1889.

No. 176.

HENRY W. KINGSBURY,
Appellant,

vs.

SIMON B. BUCKNER ET AL.,
Appellees.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

REPLY BRIEF.

JOHN P. WILSON,
FOR APPELLANT.

BARNARD & GUNTHORP, LAW PRINTERS, CHICAGO.

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Appeal from the Circuit Court of United States for the Northern District of Illinois.

REPLY BRIEF.

I.

THE DECREE OF THE CIRCUIT COURT SHOULD NOT BE AFFIRMED FOR WANT OF PROPER PARTIES.

Counsel for appellees in his brief in his seventh point, page 126, claims that the decree dismissing the bill must be affirmed because the necessary parties were not before the court to enable it to grant any relief to the complainant, and makes the point that the decree sought to be set aside vested the title to the property in Mrs. Buckner, who died pending the suit in the Circuit court, and that there is no evidence in support of the averment of the bill that the property had been conveyed to Gen. Buckner. The bill alleges that immediately after the entry of the decree

against appellant, and on "the 28th day of February, "1872, the said Simon B. Buckner and wife conveyed "unto R. W. Wooley of Louisville, Kentucky, all the "tracts so set off to Mary K. Buckner, and on the same "day the said Wooley reconveyed unto Simon B. Buck-"ner all and singular the real estate aforesaid, and the "said Simon B. Buckner is, as your orator is advised "and believes and so charges, in the present full posses-"sion and enjoyment of all said property and its income, "claiming to be sole beneficial owner by reason of the "judicial proceedings aforesaid, and the conveyance of "said Wooley and not otherwise." (Rec., 10, 11.) The cause was heard in the Circuit court upon a plea filed by Simon B. Buckner and Burnside, and an answer in support thereof. Neither the plea nor the answer denies any of the allegations in the bill except the charges of fraud and collusion with Beckwith in the prosecution of the legal proceedings which resulted in the decree complained of. It is well settled that by the filing of a plea supported by an answer, the defendant admits all the allegations of the bill not specifically denied in the answer. In the case of the *State of Rhode Island* v. *The State of Massachusetts*, 14 Peters, 272, this court said:

"The office of the plea is to reduce the cause to a "single point, and thus prevent the expense and trouble "of an examination at large. But the matters stated in "the bill which are not denied by the plea are admitted "to be true. The case of the plaintiff then, as now to "be considered, is as full and as strong as it is presented "in the bill where not denied by the plea."

In the case of *Goodrich* v. *Pendleton*, 3 Johnson, Chancery R., p. 390, Chancellor KENT, in rendering the opinion of the court, said:

"The rule is, that the equitable circumstances charged "in the bill, and which will avoid the statute, must be de- "nied by the answer as well as by the general averment in "the plea; and the answer in support of the plea (and "which is indispensable to its support) must be full and "clear, and contain a particular and precise denial of the "charges, or it will not be effectual to support the plea. "The court will intend that the matters so charged against "the pleader are true, unless they be fully and clearly "denied. The facts requisite to render the plea a de- "fense must be clearly and distinctly averred, so that the "plaintiff may take issue upon them; and the answer in "support of the plea must contain particular and precise "averments, to enable the plaintiff to meet them, as the "object of the answer is to give the plaintiff an oppor- "tunity of taking exceptions to the traverse of the facts "and circumstances charged in the bill, which, if true, "would destroy the bar set up. These general principles "of pleading are laid down in Lord Redesdale's Treatise "of Pleading, pp. 212, 214, 236, 237, a work of great "authority on the subject; they are also to be met with "in other treatises of established character. (Cooper's "Eq. Pl., 227, 228. Gilbert's For. Rem., 58. Van "Heythuysen's Equity Draftsman, p. 443."

See also,

Bogardus v. *Trinity Church*, 4 Paige, 178–196.

Upon the record as now presented to this court it is therefore admitted that immediately after the decree vesting the title to the property in Mrs. Buckner, the entire property was conveyed through the medium of Wooley to Simon B. Buckner, and that he has ever since been in the actual possession of the property, claiming to be the

sole owner thereof under the decree herein complained of. The deeds set out in the bill are shown by the public records of Cook county, and will be introduced in evidence by appellant if their existence should ever be denied by Gen. Buckner. It would have been idle upon the death of Mrs. Buckner to have made her heirs parties defendant in view of the conveyance of all the property to Gen. Buckner and his ownership and possession thereof.

II.

THE BILL FILED IN THIS CASE WAS NOT A BILL OF REVIEW, AND WAS PROPERLY FILED WITHOUT LEAVE.

Counsel for appellees makes an elaborate argument and cites many authorities under his first proposition relating to bills of review. All of the cases cited relate to bills filed by adults. These cases have no application to an original bill filed to set aside a decree against a minor which right stands in lieu of a provision in the decree giving a minor the right to have the case reheard within a limited time after attaining his majority. Counsel for appellee concedes that "the rule of law certainly allows "an *original* bill to be filed by an infant or adult to set "aside a judgment which has been procured through col- "lusion or impositions practiced on the court. An *infant* "may file an *original bill* where the complaint is as to "errors on the face of the record." (Argument, pages 115, 116.)

This is well settled by the authorities cited in the original brief in this case for appellant and in the case of *Gooch* v. *Green*, 102 Ill., 507, 510, the Supreme court of Illinois expressly held that "*the authorities cited which*

"*control the practice where a bill of review is filed cannot* "*control here.*" It is not necessary that the errors complained of in such original bill should be errors of law only. In the case of *Kuckenbeiser* v. *Beckert*, 41 Illinois, 172, it was held sufficient to set aside a decree that the evidence upon which it was rendered did not authorize the decree. The principal of law permitting a party to file an original bill to set aside a decree already rendered against him, while a minor for error is an exception to the general rules of law.

III.

THE PROPOSITION THAT THE DECISION OF THE SUPREME COURT OF ILLINOIS, NOW COMPLAINED OF, WAS RENDERED UPON APPELLANT'S APPEAL, IS NOT SUSTAINED BY THE RECORD.

It is contended that neither the jurisdiction of the Supreme court of Illinois nor the correctness of its decision can now be called in question by appellant, on the ground that it was upon his appeal that the court acted.

Counsel says: "An appeal was prosecuted by the in- "fant by his next friend, and errors assigned; a record "was filed for this appeal. The infant was in court prose- "cuting his own appeal. By repeated decisions in a "chancery case the whole case is before the Supreme "court without the assignment of cross-errors. *But in* "*this case cross-errors were assigned, and the court con-* "*sidered and decided the whole case on that appeal.* The "appeal of the complainants in the cross-bill may be dis- "regarded without affecting the result." (Argument, pp. 86, 87.)

And again: "As already remarked Henry W. Kings-"bury took an appeal himself from the decree dismissing "his original bill, and filed a transcript in the Supreme "court at Springfield and assigned errors thereon. *In* "*answer to that appeal Mrs. Buckner and her husband*, "with the other appellees, appeared and submitted the "case. By this act that court acquired authority and "jurisdiction to hear and determine the appeal irrespect-"ive of the appeal taken by Mrs. Buckner." (Argument, p. 88.)

The errors assigned will be found on pages 352 and 353 of the record. The record shows that an appeal was taken by Mary K. and Simon B. Buckner, and also by Henry W. Kingsbury, by his next friend. The assignment of errors is as follows:

"STATE OF ILLINOIS — CENTRAL GRAND DIVISION, SUPREME COURT.

January Term, 1871.

Mary K. Buckner and Simon B. Buckner, *vs.* Henry W. Kingsbury, Eva Lawrence, Albert G. Lawrence, and Jane C. Kingsbury.	*Appeal from the Circuit court of Cook county.*

"And now comes the said Mary K. Buckner and Simon "B. Buckner, appellants, and say that manifest error hath "intervened in the proceedings, of which the foregoing "is a record to their injury, and they assign the follow-"ing errors, to wit:

"1. The Circuit court of Cook county erred in dis-"missing the cross-bill. The Circuit court erred in dis-"missing the original bill without prejudice.

"2 The Circuit court of Cook county erred in re-
"fusing the relief prayed in the cross-bill; and,

"3. The proceedings are otherwise informal and er-
"roneous.

"Wherefore they pray the judgment of this court in
"the premises, and that the decree below, so far as it dis-
"missed said cross-bill, be reversed and remanded, with
"specific instructions to the court below to enter a decree
"granting the relief asked in said cross-bill, or that a final
"decree be rendered in this court, etc.

"GOUDY & CHANDLER,
Attorneys for Appellants.

R. W. WOOLEY,
Of Counsel.

And then comes Henry W. Kingsbury, by his next
"friend C. Beckwith, and assigns for error—

"1. The dismissal of the original bill.

"2. Refusing the relief prayed by the original bill.

"3. Admission of incompetent evidence in the original
"suit.

"Wherefore we pray that the decree in the original
"suit may be reversed and cause remanded.

C. BECKWITH,
Of Counsel.

It will be observed that the errors were assigned upon a single transcript of the record and that the errors assigned by Mr. and Mrs. Buckner were not, as alleged by counsel, cross-errors, and that the only errors assigned by Kingsbury related to the dismissal of the original bill, and were assigned subsequent to the assignment of errors by Mr. and Mrs. Buckner upon their appeal to the Supreme court. It is not true that the Supreme court could have

rendered its decree reversing the order dismissing the cross-bill and directing the relief therein prayed to be granted upon Kingsbury's appeal and his errors assigned thereon. Neither is it true that Mr. and Mrs. Buckner appeared in the Supreme court, as stated, in answer to Kingsbury's filing his transcript with errors assigned thereon. Mr. and Mrs. Buckner appeared upon their own appeal and assigned errors before any errors were assigned by Kingsbury, and the errors assigned by both are assigned under the cause entitled as of the appeal by the Buckners. The inaccuracy of counsel in the statements in his brief in regard to these particulars is doubtless due to the great lapse of time since the original cause was heard, and his uncertain recollection of what then transpired. But if the memory of counsel is so little to be relied upon as to matters where it might have been refreshed by a reference to the record, how little dependence can be placed on it with reference to matters not shown of record, and in regard to which it could not be refreshed. We think, therefore, the statement of counsel that the point was made orally on the hearing in the Supreme court that Buckner made the deed to Kingsbury for the purpose of being free to go into the rebel army, should not be entitled to much weight at the hands of this court in view of the fact that no such defense was set up by any of the pleadings or alluded to in the printed briefs, or in any way mentioned in the elaborate opinion of the Supreme court. It would be, to say the least, remarkable that such an important point should have been so made and ignored. If made and ignored by the Supreme court in its opinion, it certainly would have been the duty of the next friend of the minor to have filed a petition for a rehearing. The great

ability of the counsel for the minor is conceded, and if the defense now suggested occurred to such counsel and was made and insisted upon in oral argument only, and was overlooked by the Supreme court in its decision, it is, to say the least, very remarkable that in a case involving property of such great value the oversight on the part of the Supreme court was not called to its attention by a petition for a rehearing. Counsel has not favored us with his theory as to how and why the unsettled state of the country could have been the occasion of conveying this large estate to an officer in the army just entering upon active service, and why scrupulous care was taken to avoid any statement in writing that it was held in trust, and why the entire control of the property was turned over by General Buckner, who had had charge of it even in the lifetime of appellant's grandfather, and the entire absence of any request for any of the proceeds or income of the property for a term of years, and the immediate reconveyance of the entire property by Mrs. Buckner to General Buckner after the entry of the decree, and his resumption of the possession and control thereof. It is perfectly clear that the conveyance was made by Mr. and Mrs. Buckner for the purpose stated in the original brief for appellant. Neither has counsel seriously controverted the proposition that a deed made for such a purpose would not be set aside in a court of equity after it had served its purpose. It follows, then, that the evidence did not justify the decree giving the estate to the Buckners, and that said decree was erroneous; that a valid defense to the cross-bill was not set up or insisted upon by the next friend of the minor, and that, as between the original parties to the suit, the decree is open to attack by original bill in all respects as it would be if a day

had been reserved in the original decree for the minor to show cause why the decree should not stand against him.

IV.

APPELLANT IS NOT BARRED FROM PROSECUTING THIS SUIT BY THE DECISION OF THE SUPREME COURT UPON THE SECOND APPEAL.

Counsel for appellees says: "The appellant is estopped "by the judgment of the Supreme court of Illinois ren- "dered on the second appeal November 8, 1873, on the "same errors then assigned, from again asserting them." (Argument, 115.)

The allegations of appellees' plea that a decree was entered on August 2, 1872, from which Kingsbury took an appeal to the Supreme court of Illinois, etc., is not supported by the evidence. The record does not show any such decree or any appeal taken therefrom. But even if the allegations of the plea were true, appellant would not be estopped from the assignment of any errors by what transpired on such appeal. It affirmatively appears by the decision of the Supreme court that said court refused to consider any of the errors assigned relating to the matters now complained of, for want of jurisdiction. Counsel complains of the persistence with which this litigation is carried on by appellant, and the length of time over which it has continued. The original suit was certainly conducted with the utmost celerity, the cause having been submitted to the Supreme court in less than ninety days after appellees'claim was first heard of, and within ten days after the depositions were taken in sup-

port of the cross-bill. Since that submission, counsel has always succeeded in preventing appellant having a hearing upon the merits of the case. Counsel contended, when the motion was made in the Supreme court in the original cause in 1873, to set aside the order and decree of the Supreme court, that the court had no jurisdiction to entertain the motion, and was successful in his contention. Upon the second appeal to the Supreme court, counsel again contended that the Supreme court had no jurisdiction or power upon that appeal to hear or determine the errors assigned, and was successful in his contention. Upon the filing of the bill now in question, counsel contends that appellant is barred from a hearing by his two unsuccessful attempts to obtain a hearing in the Supreme court of Illinois.

V.

APPELLANT IS ENTITLED TO RELIEF UPON THE GROUND OF FRAUD AND COLLUSION IN PROCURING THE DECREE SOUGHT TO BE SET ASIDE.

Counsel says that this charge is eliminated from the case for want of evidence in support thereof. A copy of the entire record of the litigation which resulted in the entry of the decree complained of, was attached to the bill in this cause, and was offered in evidence by appellees in support of their plea, and was therefore before the court for its consideration. Our contention is, that upon the facts shown by such record the conclusion follows that the cross-bill was not defended in good faith by the guardian *ad litem* of the minor. We are entitled to the inferences which naturally follow from the facts shown by such transcript. These facts were open to ex-

planation by evidence by appellees, but no such explanation was offered on the hearing, but a decree was taken upon the ground that no replication was filed to the answer, which was not true in fact. Counsel for appellees says:

"It is admitted that this cause was speeded; that it "was determined in less time than usual in such cases. But "how was Henry W. Kingsbury harmed thereby? * * * "It appears from the record in this case that another bill "was pending, filed by Mrs. Eva Lawrence, to which "Mrs. Jane C. Kingsbury and this infant were parties; "that all the property of the estate was then in the hands "of the receiver; that the rents were large and the ex- "penses necessarily great; that the property was im- "proved; that the buildings were burned in the great "fire of 1871, and large amounts of insurance money "collected. It may well be assumed that the interests of "these parties was to determine the ownership of the "property and rescue it from the hands of the receiver. "But, I may be allowed to suppose, as a matter of argu- "ment, that there were ground leases of this property "about expiring, and that the ground was occupied by "buildings owned by the tenants, who were entitled to a "renewal of the leases or to payment for their buildings, "and that no new leases could be executed because of "the existence of this controversy, and for these reasons "that it was the interest of Henry W. Kingsbury to "have the court speedily determine who were the owners "of the property. I might suppose other facts which "would be consistent with the action of his solicitor and "friends in consenting to an earlier decision of the case. "Certain it is that there is no necessary conclusion of a "fraudulent purpose to be drawn from such action.

"What questions did Judge Beckwith, as next friend, "guardian *ad litem*, and solicitor raise in this controversy? "It appears from the original bill and from the answer to "the cross-bill, as well as from the opinion of the Su- "preme court, that every substantial question was raised." (Argument, 120–121.)

It is true that the original cause was speeded as no cause of such magnitude was ever before or since speeded. But the facts above stated by counsel in explanation of such speeding and the suppositions raised by him wholly fail to account therefor. If counsel now finds it necessary to account for the conduct of the cause by suppositions, why did he not deem it worth his while to account therefor by allegations and proofs? The principal thing that he lays stress upon is that the buildings had been burned in the great fire of 1871, and that large amounts of insurance money had been collected, and were in the hands of a receiver. The case was speeded and submitted to the Supreme court in December, 1870, and January, 1871, and the great fire did not occur until October, 1871. No buildings had been burned; no insurance money had been collected. The suppositions of counsel to explain the haste are equally without foundation. The allegation that every defense appears to have been made from the original bill, answer to the cross-bill and opinion of the Supreme court, is not true. The defense that a bill could not be filed to set aside a deed executed for the purpose for which the deed to Kingsbury was made, is not shown to have been made by either the original bill, answer to the cross-bill or opinion of the Supreme court, or, we might add, by the briefs filed in the Supreme court. Why was a bill filed in such haste to procure an injunction to enjoin in-

terference by the Buckners wi h property in the hands of a *receiver of the court?* Counsel may be correct in saying that "there is no *necessary* conclusion of a fraudulent "purpose," but certainly there was a call for explanation, which has not been answered. But counsel inquires: "How was Henry W. Kingsbury harmed by the speed-"ing of the case?" If the original cause had taken the ordinary course of a chancery suit of this magnitude, the cause would not have been heard in the Circuit court until the friends of the minor had known of the existence of the Buckner claim, and the same would have been vigorously resisted, as it was immed ately upon their learning what had taken place. That such defense would have been successful there is room for but lit le doubt. There is a distinct allegation in the bill in this case that neither appellant nor his friends knew of this claim until after the entry of the decree. This allegation is as follows:

"And your orator further shows that the filing of said "cross-bill and the appointment of said guardian *ad litem* "and all and singular the action and conduct of said cause "from and after the filing of said cross-bill until the 31st "day of December, 1870, are each and every of them "matters to which your orator is an entire stranger, and "that he had no actual or constructive knowledge of such "matters or any of them; that the filing of said cross-bill "and the matters thereof, and the relief prayed therein "was not brought to the notice of the guardian of the "person of your orator nor any of his friends or relatives "having his interest in charge, nor did they or any of "them have any notice whatever of the appointment of "said guardian *ad litem* or of the filing of the answer by "such guardian *ad litem* or the nature thereof, or the "action thereupon, nor was any equity (inquiry) at any

" time made of the guardian of the person of your orator " or any of his friends and relatives as to the existence or " production of any evidence to disprove or qualify the " matters set forth in said cross-bill or any material aver- " ment thereof or to produce any testimony that would " be of avail to protect the title of your orator by in- " heritance in and of the estate, the legal title of which " descended to your orator upon the death of his father." (Rec., 12.)

This allegation of the bill was not denied, either by the plea or the answer, and is, therefore, admitted and furnishes the only and sufficient explanation of the unprecedented speeding of the cause, and the agreed appeal to the Supreme court. A reversal of the decree of the Circuit court only gives appellant an opportunity to be heard upon the merits of the ownership of this property, and it is his persistence in asking for this, that counsel complains of as a grievance. So far counsel has succeeded in securing a denial of appellant's right to be heard, but appellant hopes for better success in this court.

Respectfully submitted,

JOHN P. WILSON,
Atty. for Appellant.

SUPREME COURT U. S.
FILED,
JAN 7 1890
JAMES H. McKENNEY,
CLERK

IN THE

SUPREME COURT OF UNITED STATES.

OCTOBER TERM, A. D. 1889.

No. 176.

HENRY W. KINGSBURY, *Appellant,*

vs.

SIMON B. BUCKNER et al., *Appellees.*

REPLY BRIEF.

LYMAN TRUMBULL,
(With John P. Wilson)
Of Counsel for Appellant.

HORACE O'DONOGHUE, BRIEF AND ABSTRACT PRINTER 192 S. JEFFERSON ST., CHICAGO.

IN THE

SUPREME COURT OF UNITED STATES.

OCTOBER TERM, A. D. 1889.

No. 176.

HENRY W. KINGSBURY, *Appellant,*

vs.

SIMON B. BUCKNER et al., *Appellees.*

REPLY BRIEF.

The statement of this case by counsel for appellee, and especially that part of it purporting to be an "Additional statement correcting Judge Trumbull's mistakes" (Mr. Goudy's brief, p. 38, *et cætera*), makes it proper to file a reply calling attention to those parts of the record which conclusively show the mistakes of Mr. Goudy, in attempting to correct what were no mistakes. On page 39 of his corrections, he asserts: "It is quite certain that portions of the papers were omitted." Opposed to this assumption is the following certificate (*Record, p. 173*), annexed to the transcript of the record, prior to the fire, to wit: "I, Norman T. Gassette, clerk of the Circuit Court

" of Cook County, in the State aforesaid, do hereby cer-
" tify the above and foregoing to be a true, perfect and
" complete copy of all papers on file and all proceedings
" entered of record in a certain cause lately pending in
" said court on the chancery side thereof, wherein Henry
" W. Kingsbury is complainant and Ambrose E. Burnside
" *et al.* are defendants to the bill, and Mary K. Buckner
" and Simon B. Buckner complainants, and H. W.
" Kingsbury *et al.* defendants to the cross-bill."

" In witness whereof I have hereunto set my hand
" and affixed the seal of said court, at Chicago, this third
" day of January, A. D. 1871.

[Seal.] " NORMAN T. GASSETTE,
" *Clerk.*

" Stamp 5 cents (1,114). Jan. 3d, '71.

" $100 for the record, paid by Goudy & Chandler."

This transcript was made up and certified to before the destruction of the records by fire, October 9, 1871. No records since have been destroyed. Counsel for appellee would have the court decide this case on the assumption that the record ought to be different from what it is. He is entitled to no presumptions on account of lost records. The transcript was made up and certified to as complete before the fire, and since then the record is extant.

A second mistake is charged to have occurred " in " Judge Trumbull's argument, page 34, where he called " attention to the allegation of the plea that the cause was " heard December 31, 1870, and a decree rendered as of " the 24th of the same month, and then asserts that this " allegation is not proved." (*Mr. Goudy's Brief, p.* 40.) What Judge Trumbull did say at page 34, is as follows: " It seems to have been assumed by all parties, as the plea

" alleges, that, on the 31st day of December, 1870, the " cause upon the original and cross-bills came on to a hear- " ing on the pleadings and evidence, and a decree was " thereupon rendered by said court as of the 24th of the " same month. The record offered in evidence states that " the cause came on for hearing on December 24, 1870, and " not on December 31st, as alleged." That Trumbull's statement is strictly true is proved by the record, page 265.

The third alleged mistake is, that " at the bottom of " page four he (Trumbull) states that the deposition of " Mrs. Kingsbury was taken December 28th, four days " after the hearing." (*Goudy's Statement, p. 40.*) What Trumbull does state, at the bottom of page four, is not that Mrs. Kingsbury's deposition was taken December 28th, but that " depositions were presented, taken by complainants in " the cross-bill, at Louisville, Ky.; Lyme, Conn., New York " and Chicago, the latter (that is, the deposition at Chicago) " December 28th." Who made the mistake? Does not the record show that the deposition at Chicago was taken December 28th? (*Record, p. 173.*)

The fourth alleged mistake is the statement " that the " only evidence of filing the mandate and redocketing was " in the decree of November 13, 1871." To correct this alleged mistake, Mr. Goudy (p. 41) states: " The case was in " court and notice was served of a motion November 3d, " and the court found by the order entered November 4th " that all parties were in court." The order entered November 4th had no relation to the decision of the Supreme Court or its mandate, but was an order substituting a copy of the record and proceedings in the Circuit Court for the originals, which had been destroyed by fire (*Record, p. 356*), and this court is asked to consider this order as proof

of the filing of the mandate of the Supreme Court upon notice to the infant!

Counsel say "Judge Trumbull claims a failure to "prove the averment that the cause was redocketed upon "the mandate of the Supreme Court, October 31, 1871, "and that the only evidence of filing the mandate and re-"docketing was in the decree of November 13, 1871, of "which the guardian *ad litem* had no notice." What is there said, is strictly true. The restoration of the records of the Circuit Court destroyed by fire, was not a redocketing of the case upon the mandate of the Supreme Court. But upon this restoration of the records, November 4th, and not October 31st, the court is asked to presume, as alleged in the plea, that the cause was redocketed upon the mandate of the Supreme Court, October 31, 1871. (Appellee's brief, p. 41.)

The fifth mistake charged in Mr. Goudy's alleged corrections (p. 41), is, that "Judge Trumbull says, in substance, "there is no proof of a second appeal to the Supreme "Court from the decree entered in pursuance of the direc-"tions of that court, or from any subsequent decree, and "particularly none from an order of August 2, 1872, nor "any evidence that any such decree was ever entered."

An examination of the record fully sustains all that is said in the above quotation. The record will be searched in vain for any evidence of a decree entered August 2, 1872, or of any appeal from any order or decree of the Circuit Court, except that of December 24, 1870. The evidence of the allowing and perfecting of appeals from the Circuit to the Supreme Court is to be found in the records of the Circuit Court, and not in recitals and opinions of the Supreme Court. Counsel for appellee refers to the report of the commissioners making parti-

tion, the decree of the court confirming their report in part, and an executed writ of assistance (*Record, p. 42*), all of which took place prior to August 2, 1872, as evidence of an appeal from a decree of that date. Besides this, counsel refers to an assignment of errors in the Supreme Court by Anson Sperry, guardian of Henry W. Kingsbury, an argument of counsel and an opinion of the Supreme Court, as proof of a decree entered August 2, 1872; but none of the assignments of error are upon a decree entered August 2, 1872; nor does the record show that Anson Sperry was ever appointed guardian of the infant or had any authority to appeal for him; and, surely, Henry W. Crawford had no authority as attorney to represent the infant. The opinions of the Supreme Court, though stated by the master to have been offered in evidence, are not copied into the record; and, if they were, they are not competent to prove the records of the Circuit Court, where all the evidence of the taking of appeals, if any were taken, is to be found.

Counsel, at page 46 of his brief, states: "While it "appears to be true that, by some inadvertence, a certified "copy of the decree of August 2, 1872, does not appear "in the evidence introduced before the master, and that, "for want of such copy, it was not technically proved that "an appeal was prayed by the guardian of Henry W. "Kingsbury and allowed, yet it is abundantly proven that "there was such a decree, as well as three others preceding it, from which appeals were prayed and allowed." It is denied that there is any such proof in the record as counsel asserts, or that any errors were ever assigned by anybody upon a decree entered August 2, 1872. As to the decree entered November 13, 1871, the opinion of the Supreme Court, 70

Ill. 522, says: "No appeal was taken from the decree of "November 13, 1871, but appeals were taken from some "of the decretal orders intervening that and the final "decree of August 2, 1872." What these decretal orders were, or that of August 2, 1872, nowhere appears. It is manifest that the Supreme Court, in affirming all decrees and decretal orders antecedent to that of August 2, 1872, had no reference to the decree of December 24, 1870, or November 13, 1871, but wholly to the intervening orders from which the opinion states appeals had been taken.

At page 47 of appellee's brief, it is stated "The more "serious mistake made by Judge Trumbull is in regard to "the alleged fraudulent alteration of the cross-bill. The "bill in this case is full of charges of collusion and fraud, "and Judge Trumbull states them as if they had been "proved. There was not the slightest effort to prove such "allegations."

Were not all the allegations admitted by Buckner and Jane C. Kingsbury, who demurred to the bill and whose demurrers were severally sustained? The printed record contains an argument by Edward S Isham and Henry W. Crawford, with an affidavit of Wm. H. Wherland, referred to as "Exhibit D." Trumbull's original brief and argument were prepared from this printed record, and Wherland's affidavit referred to, before it was discovered that the clerk had, by mistake, copied, as "Exhibit D," the argument of Isham and Crawford and the affidavit of Wherland, instead of the argument of Henry W. Crawford. When this mistake of the clerk was discovered by counsel for appellee, a stipulation was entered into, which is copied in counsel's statement, page 49, correcting the mistake, and Crawford's argument, to which special attention is called, is printed

as an additional transcript to the record, and Trumbull's brief has been corrected so as to eliminate from it the Wherland affidavit, although the affidavit is referred to in the order of the Supreme Court, entered January 20, 1873. (*Record, p. 394.*) But the evidence of the fraudulent alterations of the cross-bill does not depend on the Wherland affidavit. It is abundantly established by other parts of the record, as shown on page 45 of Trumbull's original brief and argument. An examination of the entire record will show that none of the allegations of the plea in reference to appeals from the Circuit to the Supreme Court, subsequent to the appeal from the decree of December 24, 1870, are sustained by the record. The Circuit Court, therefore, erred in finding the issues upon the plea for the defendant.

It is insisted by counsel for appellee that Beckwith and Jane C. Kingsbury had no interest in the case, and that, therefore, there was no error in sustaining their demurrers. If the allegations of the bill are true, Beckwith is responsible for any damages his misconduct may have brought upon the infant. The record shows, that, if what was known as the Spencer tract, which had been conveyed to a trustee by Mrs. Buckner's father, was part of his estate which descended to his heirs, as claimed by Mrs. Buckner, Jane C. Kingsbury would have a dower interest in it; while, if it was not inherited by his heirs, but the title to the same was absolute in Emily Spencer, as held by the Supreme Court (70 Ill. 521), she would have no dower interest in it She is also interested as doweress in the whole estate left by her husband. The sustaining of the demurrers is an error, for which the decree of the Circuit Court would have to be reversed, if for no other.

Counsel for appellee makes the point, page 126 of his

brief, that the decree dismissing the bill must be affirmed, because the parties were not before the court to enable it to grant any relief to the complainant, and insists that Mrs. Buckner, while living, and Lily Buckner, who was substituted as party complainant to the cross-bill, March 7, 1877, were vested with the title to the estate in controversy, and that when, July 19, 1878, the death of Mary K. Buckner was suggested in this case, and an order entered that the suit abate as to her, there remained no party to the suit to enable the court to grant any relief, without making Lily Buckner a party. But the bill shows that the entire interest in the estate at the time it was filed was in Simon B. Buckner, and not in his wife. The allegation is, that "on the 28th day of February, 1872, the said "Simon B. Buckner and wife conveyed unto R. W. "Wooley, of Louisville, Ky., all the tracts so set off to "Mary K. Buckner, and on the same day the said Wooley "reconveyed to Simon B. Buckner, all and singular, the "real estate aforesaid, and the said Simon B. Buckner is, "as your orator is advised and believes, and so charges, in "the present full possession and enjoyment of all said "property and its income, claiming to be sole beneficial "owner by reason of the judicial proceedings aforesaid, "and the conveyance of said Wooley." (*Record, p. 10.*) But it is said, there is no evidence whatever to sustain this averment. None of the defendants denied its truthfulness. Instead, two of the defendants demurred to the bill, and two others filed a plea in bar. The court sustained both the demurrers and the plea, and no issue was taken upon the averment of Buckner's ownership of the property. There has been no opportunity to furnish the evidence of its truth. So far as appears from the statements of the bill, which, in disposing of the demurrers and

the plea, are to be taken as true, Simon B. Buckner is the real party in interest. If this were not so, he would have an estate of courtesy, or a right of dower, in the estate of his wife, and the suit could be maintained against him as surviving defendant. Chap. 1, sec. 12, of the Revised Statutes of Illinois, declares: "When there are sev-"eral plaintiffs, petitioners or complainants or defendants "in an action, proceeding or complaint in law or equity, "the cause of which survives, and any of them die before "final judgment or decree, the action, proceeding or com-"plaint shall not on that account abate, but such death "may be suggested on the record, and the cause proceed "at the suit of the surviving plaintiff, petitioner or com-"plainant, or against the surviving defendant, as the case "may be, in all cases as if such persons had been originally "sole parties to the suit." No objection for want of parties was taken at the hearing, and, if it appeared that Lily Buckner had an interest, it would have been competent for the court to make a decree without making her a party or affecting her rights.

Counsel for appellee complains, at page 6, that appellant offered no evidence to sustain the averments of his bill, and asserts (p. 122): "It was evident to everybody "that Mrs. Buckner was equitably entitled to a reconvey "ance of the property."

Again, at page 113 of his argument, counsel says: "There is no suggestion that injustice has been done the infant." In reply to these assumptions, attention is called to the bill of appellant (*Record, p. 23*), where it is alleged, in substance, that, after the property had descended to Mary K. Buckner and Henry W. Kingsbury, by the death of their father in 1856, Simon B. Buckner had the entire management of the estate till 1861, during all which time

he received and disbursed the income as he saw fit, and, during the minority of appellant's father, caused a portion of the descended lands to be sold and conveyed, which were then worth about $75,000; that no part of the consideration of such conveyance was ever received by, or accounted for to, appellant's father in his lifetime, or to appellant since his death, but that the entire proceeds were either appropriated by Buckner to his own use or managed so negligently that he is chargeable therewith; that the income of the estate from 1856 to 1861, received by appellant's father, did not exceed the sum of $300, and that the amount appropriated by Buckner to his own and his wife's interest during that period amounted to, at least, $50,000; that during Buckner's management he caused incumbrances to be put on the property, in the way of mortgages, to the amount of more than $120,000, and, while appellant's father joined in the mortgages, the actual transactions were directed and carried out exclusively by Buckner, who received all the money therefrom, and appellant's father never received a single dollar of any of the money derived from the incumbrances upon the estate; that, while some portion of the mortgage money went to improve the property, Buckner has never disclosed the accounts thereof, and appellant charges that at least $75,000 of money derived from mortgages on the property were appropriated by Buckner for the private use of himself and wife; that said Buckner has never at any time made any report of his receipts or disbursements while managing said property, and that by reason of his dealings with the common estate the shares of the property remaining unsold, justly belonging to the father of your orator at and before May 15, 1861, was largely in

excess of the one-half thereof. If it be said the allegations of the bill are not proven, the answer is that there has been no opportunity to prove them.

In reply to the statement that the decree of November 13, 1871, was procured upon illegal and incompetent testimony of Simon B. Buckner and Jane C. Kingsbury, who, being parties to the suit or interested therein, were, by the statute, made incompetent, of their own motion, to testify, counsel for appellee, in his argument, pages 94–5, contends that Buckner had no legal interest in the event of the suit, because he only "claimed his legal and equitable rights in order to enable him to carry out" his purpose of placing "the whole of the property in the exclusive control of his wife," thus making the right of an interested party to testify, contrary to the terms of the statute, to turn upon the purpose for which he says he was interested. Could anything be more absurd, unless it be the counsel's other contention that Buckner did not testify "of his own motion," for the reason that his evidence was taken on a commission, when the record shows that the commission was sued out at his own instance? If this be the construction of the statute, all that an interested party has to do to qualify himself to give evidence of his own motion, when the adverse party defends as guardian, is to cause himself to be summoned as a witness or be examined on a commission. Of what value would the statute be thus construed? It is, however, wholly immaterial whether Buckner and Jane C. Kingsbury were interested in the suit. They were parties, and necessary parties, to it, which disqualified them from testifying.

At page 115 of his argument counsel says: "The "rule of law certainly allows an original bill to be filed by "an infant or an adult to set aside a judgment which has

"been procured through collusion or impositions prac-
"ticed on the court. An infant may file an original bill,
"where the complaint is, as to errors, on the face of the
"record. It is quite immaterial, in this case, what the
"bill shall be called. The ground of relief is, first,
"errors apparent on the face of the record, and, second,
"collusion and fraud." Had it been known in advance that appellee would have conceded what is undoubtedly the true rule of law, it would have saved some labor in hunting up authorities to establish it. The concession of the right of an infant to file a bill for relief against errors on the face of the record carries with it the right to relief if the errors exist. Hence it is only necessary, in this case, to point out the errors of law apparent in the record to cause a reversal of the decree. These errors are pointed out in the briefs and arguments in behalf of appellant, heretofore filed.

LYMAN TRUMBULL,
(with JOHN P. WILSON),
Of Counsel for Appellant.

FILED.
DEC 16 1889
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1889.

No. 176.

HENRY W. KINGSBURY,
Appellant,
vs.
SIMON B. BUCKNER ET AL.,
Appellees.

Appeal from Circuit Court of the United States for the Northern District of Illinois.

POINTS, AUTHORITIES AND ARGUMENT FOR APPELLEES.

W. C. GOUDY,
FOR APPELLEES.

BARNARD & GUNTHORP, LAW PRINTERS, CHICAGO.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1889.

No. 176.

HENRY W. KINGSBURY, *Appellant,*
vs.
SIMON B. BUCKNER et al., *Appellees.*

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

STATEMENT.

INTRODUCTION.

The controversy in this case is in regard to real estate of great value in Chicago. The appeal is from a decree rendered by the Circuit court for the Northern district of Illinois, July 19, 1878, dismissing a bill filed by the appellant against Mary K. Buckner, Simon B. Buckner, Corydon Beckwith and Jane C. Kingsbury. (Rec., 203.)

The bill was filed in the Circuit court of Cook county, Illinois, August 11, 1873, by Henry W. Kingsbury, the appellant, then an infant ten years of age, by Eva Lawrence, his guardian and next friend, and who was also his mother. One of the persons, John J. D. Kingsbury,

named, as a defendant, was not brought into court. Mary K. Buckner, the principal defendant, died pending the suit, and it was abated as to her, there being no application to revive the same.

The object of the bill was to set aside certain judicial proceedings by virtue of which the appellant Henry W. Kingsbury had been held to be a trustee for Mary K. Buckner, and by virtue of which the legal title had been vested in her by a deed of conveyance executed in pursuance of the decree of the court. (Rec., 28.)

The ground on which relief was sought was, *first*, errors appearing on the face of the record, and, *second*, the procurement of the decrees sought to be avoided on the ground of alleged collusion and fraud between Mary K. Buckner and Simon B. Buckner, her husband, and Corydon Beckwith, solicitor for Henry W. Kingsbury.

To this bill a demurrer was interposed by Corydon Beckwith and Jane C. Kingsbury. A plea was filed by Simon B. Buckner and Ambrose E. Burnside, alleging facts constituting an estoppel as to the errors claimed to exist on the face of the record, and the same defendants answered the remainder of the bill alleging fraud and collusion by denying the averments of the bill. (Rec., 180, 191.)

The cause stood on demurrer to the bill from October 16, 1873, until April 16, 1877, when it was dismissed for want of prosecution. (Rec., 177, 178.) The order of dismissal was set aside on motion of complainant's solicitor, supported by affidavit May 17, 1877. (Rec., 180.) On the same day Simon B. Buckner and Ambrose E. Burnside withdrew their demurrer and by leave filed a plea to a part of the bill and answer as to the other. (Rec., 180.)

May 23, 1877, the cause was removed from the State court to the United States Circuit court on the application of Henry W. Kingsbury by his guardian and next friend, under the act of 1875. An answer to the petition for removal was filed setting up the proceedings in the State court between the time the bill was filed, August 11, 1873, and the time the application was made to remove, May 23, 1877, for the purpose of showing that it was too late to remove the case. (Rec., 192–197.)

December 1, 1877, an order was made on the motion of the complainant's solicitor setting down the cause for hearing upon the bill, answer and plea. (Rec., 197.)

April 27, 1878, an order was entered substituting John V. LeMoyne instead of Eva Lawrence, Mr. LeMoyne having become the guardian; and at the same time leave was given to the complainant to reply to the plea and answer. And the order recites that a replication was then filed, and the cause was set down for hearing on the pleadings. (Rec., 197.)

May 20, 1878, another order was entered by which the order of April 27th was set aside, and the court then entered an order reciting that the cause coming on for hearing under the order before entered, John V. Le Moyne appearing as guardian of the complainant, Henry W. Kingsbury, and the defendants by W. C. Goudy, and it appearing to the court that Eva Lawrence had resigned and John V. Le Moyne had been appointed as her successor, it was ordered that John V. Le Moyne, guardian, etc., be substituted for Eva Lawrence and authorized to prosecute the suit as if he had been originally named in the bill; the order then proceeds: "And the said John V. Le Moyne, guardian, as aforesaid, then asked leave to file a replication to the defendant's plea, and a replication

to the defendant's answer, which the court allowed upon the condition that the hearing should not thereby be delayed. It is further ordered that complainants close their proofs herein by the 15th day of June next, and that it shall be in order for either party to set the cause for hearing on the pleadings and proofs at any time after said date for closing proofs." (Rec., 202, 203.)

There appears *now* in the record a replication to the plea, and also to the answer, both of which appear to be filed May 1, 1878. (Rec., 198.)

May 8, 1878, on the motion of the defendant's solicitor the cause was referred to the master to take proofs and report the same. (Rec., 199.)

May 18, 1878, the master filed his report from which it appears that no testimony whatever was offered on behalf of the complainant, and that the defendants offered in evidence the record of the judicial proceedings sought to be set aside, together with two opinions of the Supreme court of Illinois rendered on two different appeals; and also, the errors alleged by counsel for Henry W. Kingsbury, the appellant, as appearing in such proceedings. (Rec., 200–378; 391–395.)

The paper printed in the original record as Exhibit D to the master's report was not the document which was a part of his report, another having been substituted in the transcript sent up by mistake The appellant, however, has supplied a copy of Exhibit D, in an additional transcript of the record.

July 2, 1878, the cause was submitted to the court on the pleadings and proofs, and it was taken under advisement.

July 19, 1878, a decision was made and decree entered, which reads as follows:

"This cause coming on for a final hearing upon the pleadings and proofs, and it being suggested that Mary K. Buckner has died since the commencement of this suit, it is ordered that the suit abate as to her, and it is further ordered and decreed that the demurrer of Corydon Beckwith, and the demurrer of the defendant, Jane C. Kingsbury, to the bill be severally sustained, and the court having found the issue for the defendants Simon B. Buckner and Ambrose E. Burnside on the plea filed by them, and no replication having been filed to their answer, it is further ordered, adjudged and decreed that the bill be dismissed for the want of equity, and that the guardian of the complainant, Henry W. Kingsbury, pay the costs from the funds belonging to his ward." (Rec., 203, 204.)

December 12, 1885, Henry W. Kingsbury presented a petition praying an appeal from the decree just quoted, and therein alleged that he was born December 16, 1862. The court allowed the appeal on the filing a bond, which was not a supersedeas. (Rec., 204-207.)

A transcript has been filed in this court, and I have been furnished with an argument on behalf of the appellant by Mr. John P. Wilson, in which he assigns the following errors:

"1. The Circuit court erred in finding the issues for the defendants, Simon B. Buckner and Ambrose E. Burnside, upon the plea filed by them.

"2. The Circuit court erred in finding that no replication had been filed to the answer of Simon B. Buckner and Ambrose E. Burnside.

"3. The court erred in decreeing that the bill should be dismissed for want of equity.

"4. The court erred in not entering a decree in accordance with the prayer of complainant's bill.

"5. The court erred in severally sustaining the demurrers of Corydon Beckwith and of Jane C. Kingsbury." (Argument for appellant, 10.)

The record in this case is badly constructed; having papers out of their proper order and containing clerical mistakes, but it contains the material matters necessary for the consideration of this court.

The counsel for appellant seems in the main to argue this case as if the original suit was on hearing. Before the matters involved therein can be opened for trial and decision, the decree from which the appeal is taken must be reversed. The appellant offered no evidence whatever to sustain the averments of his bill. If there was fraud and collusion as alleged, it was necessary for him to introduce proof to sustain such averments. The defendants having denied all such statements, it was not necessary for them to offer proof until testimony had been produced by the complainant. The defendants, Simon B. Buckner and Ambrose E. Burnside, having interposed a plea of *res judicata*, might properly be required to sustain the same by evidence. There was an issue made on this plea by the filing of a replication. If in the opinion of the complainant's counsel it was insufficient, the proper practice would have been for him to move to set the bill down for hearing instead of filing a replication thereto. The replication was general and no exceptions were taken to it on that account.

Every averment of the plea was fully proved by the production of the proceedings recited therein. In this case all of the defendants might well have demurred to

that part of the bill to which the plea was interposed, because the bill, together with a transcript of the record attached thereto and made a part of the bill, exhibited the facts which constituted the estoppel. Two of them, however, saw fit to withdraw the demurrer and filed the plea. After issue was joined upon it the question was not as to its sufficiency, but as to whether the proof sustained it. In regard to that there can be no question. As to the other portion of the bill, as already stated, there was a denial of the statements therein, casting upon the complainant the burden of proof, and no evidence whatever was offered to sustain them. Two of the defendants, Mrs. Kingsbury and Judge Beckwith, rested upon a demurrer which was properly sustained, because they were only nominal parties, and no relief whatever was sought against them. The only other person who had appeared in court was Mrs. Buckner, and the suit abated as to her by death, no representatives being substituted in her stead. On this state of facts the court below properly dismissed the bill. I might stop at this point without further statement, or argument, but in view of the fact that this appeal is prosecuted by eminent counsel who seem to rely upon the errors assigned, and the large value of the property in question, it seems to be my duty to meet the points which have been made, and, perhaps to go further by calling the attention of the court to all the facts, and discussing the propositions involved.

POINTS AND QUESTIONS ARISING IN THE CASE IN WHICH THE DECREE WAS RENDERED NOW APPEALED FROM.

Mr. Wilson in his statement collects facts from the pleadings and evidence in the original suit, not confining himself to those presented by the bill which sought to set

aside the decree in the former case. The main point discussed by him is that the court in the original suit erred in its conclusions from the testimony as to facts. No such question could be considered by the court below, nor by this conrt. It is only material to examine the bill to ascertain the alleged errors in the original suit because it is upon this ground, if at all, that this court can reverse the decree.

The bill contains introductory statements before proceeding with the averments in regard to the proceedings in the former suit. As a part of such introduction the bill states that the complainant was born December 16, 1862; that his father (Henry W. Kingsbury, after whom he was named) was born December 25, 1836, married Eva Taylor December 4, 1861, and was killed at the battle of Antietam, September 17, 1862; that the complainant was born after the death of his father, and was his sole heir at law, and inherited all of the property of his father, subject to the dower rights of his mother, and, also, the dower rights of his grandmother, Jane C. Kingsbury, and that his mother was remarried to Albert G. Lawrence, September 26, 1865.

The bill proceeds to show that the grandfather of the complainant, Julius J. B. Kingbury died intestate, June 26, 1856, leaving Jane C. Kingsbury, his wife, surviving and two children, Mary K. Buckner, who was the wife of Simon B. Buckner, and Henry W. Kingsbury, the father of the complainant; That Lily Buckner was the child of Mr. and Mrs. Buckner, born March 7, 1858.

The bill then states that Julius J. B. Kingsbury at the time of his death was the owner of certain real estate, describing the same, which by law descended to Mary K. Buckner and Henry W. Kingsbury, his children, each being entitled to an undivided one-half.

The bill then shows that on the 15th day of May, 1861, Simon B. Buckner and Mary K. Buckner made a deed, in consideration of one dollar and the natural love and affection they bore to their brother Henry W. Kingsbury, to him, conveying an undivided one-half of certain property in Chicago, describing it, which was sent to Chicago and there recorded; and it is alleged that such deed was made with intent to pass the title to the father of the complainant, who accepted the same, and took possession of the property, and on his death it descended to the complainant, as sole heir at law, subject to the dower interest therein.

The bill then shows that a paper purporting to be a copy of a will probated at Alexandria, Virginia, had been presented to the County court of Cook county, May 9, 1870, where it was admitted to record. (Rec., 1–8.)

After the foregoing introductory statements, the bill proceeds to state that on the 19th of July, 1870, a bill was filed in the Circuit court of Cook county by the complainant, Henry W. Kingsbury, by Corydon Beckwith as his next friend against Ambrose E. Burnside, Mary K. Buckner, Simon B. Buckner, Jane C. Kingsbury, John J. D. Kingsbury, Eva Lawrence and Albert G. Lawrence, in which was set forth his ownership of all of the property in Chicago by inheritance, and which prayed that the paper purporting to be the will should be declared invalid and set aside as a cloud on his title. It is further stated that on the 31st day of October, 1870, Mary K. Buckner and Simon B. Buckner filed an answer, and subsequently the other defendants filed answers to which replications were filed, and on the 31st day of October, 1870, Mary K. Buckner filed a cross-bill against the original complainant, and Eva Lawrence, Albert G.

Lawrence and Jane C. Kingsbury, setting up that the deed of May 15, 1861, was a deed of trust for the use and benefit of the cross-complainants, or one of them, and asking that such trust be declared and the property reconveyed. Corydon Beckwith was appointed a guardian *ad litem*, and as such answered the cross-bill, which was also answered by Eva Lawrence and Albert G. Lawrence.

The bill further shows that after testimony was taken, on the 31st day of December, 1870, a hearing was had on the original and cross-bills and a final decree was rendered as of the 24th of December, 1870, by which both bills were dismissed; from which decree an appeal was prosecuted by Mary K. Buckner and her husband, Simon B. Buckner, and also by Henry W. Kingsbury by his next friend and guardian *ad litem;* such appeals were by agreement to be prosecuted to the January term, 1871, of the Supreme court to be held in the Central grand division.

The bill states that errors were assigned by the respective appellants in the Supreme court of Illinois at the January term, 1871, holden for the Central grand division, and on the 5th day of October, 1871, a judgment was entered reversing the decree below and remanding the cause with directions to the Circuit court to enter a decree. (Rec., 8, 9.)

The bill further states that on the 13th day of November, 1871, without hearing any new testimony, a decree was entered by the Circuit court in execution of the mandate of the Supreme court, and in obedience to the said decree a deed was made by the master in chancery to Mary K. Buckner, conveying an undivided one-half of the property on behalf of Henry W. Kingsbury, which

deed was by a subsequent decree entered in January, 1872, confirmed; that a partition was ordered and commissioners appointed to make the same, and that such commissioners made a partition and filed their report, to which exceptions were filed and the report was approved and confirmed, except as to the Spencer tract, which was reserved for further order and that further proceedings were had in regard to accounts and decrees rendered, a copy of all which judicial proceedings are attached to the bill as an exhibit. (Rec., 10.)

It is alleged in the bill that Mary K. Buckner and Simon B. Buckner claimed that the legal proceedings appearing by the record, exhibited to the court, are valid and binding upon the complainant, and that by virtue thereof, a perfect title at law and equity has become vested in them for the half of the estate descended to the complainant—while the complainant claims that said judicial proceedings were fraudulent, collusive and erroneous, and insufficient to conclude him in any respect. (Rec., 11.)

The bill then proceeds to point out alleged errors in such judicial proceedings appearing upon the face of the record, which are claimed to be sufficient for a reversal of such decrees.

First. That Henry W. Kingsbury, at the time of the filing of the cross-bill, was a non-resident of Illinois, and continued such until the entering of the decree; that no process was sued out or served upon him, nor was any publication, such as is required by the statute in case of non-residence, made, and that the only jurisdiction was by appointment of a guardian *ad litem*, and answer filed by him.

Second. That the matters in the cross-bill are not germane to those set forth in the original bill, but the cross-bill presents a new and independent litigation, and for that reason, as well as the want of process or notice, there was no jurisdiction to enter the decree upon the cross-bill. It is charged that Judge Beckwith failed to question the jurisdiction over the person or subject-matter, either in the Circuit court or the Supreme court.

Third. That to obtain the decree in the Supreme court and the Circuit court, establishing and enforcing the trust, the Buckners with the consent of Beckwith, made use of the testimony of Simon B. Buckner, who was an incompetent witness and whose deposition was taken by virtue of a commission, issued without notice for the proper length of time.

Fourth. That the deposition of Wm. F. Barrett was taken by virtue of a commission sued out upon a notice of nine days, while the law required ten, and that portions of his testimony were incompetent according to the rules of evidence.

Fifth. That the depositions of Jane C. Kingsbury and Ambrose E. Burnside, were each taken upon a commission upon notice served upon the guardian *ad litem* upon less time than required by law, that being waived, and that each of said persons were incompetent witnesses.

Sixth. That the depositions of D. W. Mitchell, John G. Shortall and John Woodbridge were taken without any order of said court and without the service of any notice, and without suing out a commission, or service of interrogatories.

Seventh. It is charged that Judge Beckwith, the guardian *ad litem*, failed to object to the use of any of said

depositions or to move to suppress the same, and that he failed to bring such matters to the notice of the Circuit court or the Supreme court.

Eighth. That replications were filed to the answers on the 24th day of December, 1870, and by the statute then in force, the case stood for hearing at the next term, on the 16th of January, 1871, and that the hearing of said cause and entry of decree before that term, was without jurisdiction and the proceedings were void, and it is alleged that there was no actual hearing in the Circuit court.

Ninth. That the averment in the cross-bill of a letter by the father of the complainant to his mother, as explained by a conversation with her, were not in the cross-bill when the answer and replications were filed, but the same were inserted therein after that time without leave to amend, and that there was never any issue joined on said allegations.

Tenth. That it was contrary to law to waive an appeal bond, and that no appeal could be allowed without one being filed.

Eleventh. That the final decree was in fact entered December 31, 1870, and antedated as of the 24th of the same month, so that said final decree might be of apparent date more than ten days prior to the first day of the next term of the Supreme court, sitting in the Central grand division, beginning on the 4th day of January, 1871.

Twelfth. That the appeal was prosecuted by agreement of parties to the January term, 1871, held in the Central grand division, and that the appeal should have been taken to the Supreme court, and heard at a term in the Northern grand division; that the guardian *ad litem*

had no authority to consent to a hearing of the appeal in the Central grand division, and for these reasons, the Supreme court had no jurisdiction over the subject-matter of the bill or person of the complainant.

Thirteenth. That although errors were assigned upon the record in the Supreme court, yet there was never any joinder in error by the complainant nor his guardian *ad litem*, nor any rule therefor.

The bill alleges that all of these things are errors appearing on the face of the record, and they are also presented as evidences of collusion and fraud between the Buckners and Beckwith.

There are other averments of collusion and fraud in bill, all of which are denied by the answer. The bill then contains the following statements:

"Your orator claims that said conveyance of May 15, 1861, to said Henry W. Kingsbury was acquired in good faith by him, was executed and delivered to him without any fraud or mistake and for a valuable consideration, with intent to pass title to him, as appears by the terms of said deed, and that the said Henry W. Kingsbury entered into full and actual possession thereof, claiming title thereto, and that such possession of such property under such claim and color of title was maintained continuously by said Henry W. Kingsbury and your orator, claiming by descent under him, from the year 1861 down to the date of filing said cross-bill, and during such nine years said Henry W. Kingsbury and your orator paid or caused to be paid all and singular the taxes which were levied and assessed upon the said property; and your orator claims and will insist that by virtue of such possession, claim and color of title and payment of taxes, your

orator was, on the filing of said cross-bill, the absolute owner in fee simple of all and singular the said property, entirely free from all claim, right or equity in said Mary K. or Simon B. Buckner, by reason of any of the matters in said cross-bill set forth; and your orator shows that none of such matters of equity and limitation, favoring your orator, was disclosed by the pleadings or testimony or proven or averred or brought to the notice of the said Supreme court in any manner, and your orator has never had the benefit or avail of such matters.

And your orator shows that said Simon B. and Mary K. Buckner, in manner and form as aforesaid, and by means of illegal and incompetent testimony, and by the irregular and fraudulent practices hereinbefore detailed, have obtained a decree in this court purporting to divest your orator of his inheritance, and have seized upon one-half of the estate of your orator and appropriated it to their own use and benefit, and the said Simon B. Buckner is now in its enjoyment, and they do claim and pretend that by reason of such decrees, conveyances, partition and judicial proceedings they have acquired a good and indefeasible title in and to the property once vested in your orator, and have full authority to encumber, convey, and enjoy the same, and that your orator is concluded by such judicial action and has no equity or title in and to said premises.

Whereas your orator claims unto your Honors that the said court had no jurisdiction to decree said matters or any of them as against your orator, and that even if such court did have jurisdiction, that such decrees, conveyances and partition were obtained by fraud and irregular and undue practice on the part of said Simon B. and Mary K. Buckner and the consent of said Beckwith, and

that in equity your orator should not be bound thereby, but is entitled to be heard as against said decree, and show error therein, and to be restored to his rights in said property, and to have said Buckners enjoined from setting up said fraudulent title against him, and that they should be compelled to reconvey the property now in his possession, the title to which has been procured by their illegal and fraudulent practices as aforesaid." (Rec., 26, 27.)

The prayer of the bill is as follows:

"And your orator prays that upon the final hearing hereof, the said judicial proceedings by virtue of which the said Simon B. Buckner and Mary K. Buckner claim title to and enjoy the possession of your orator's estate as aforesaid, shall be declared to have been procured and brought about by the illegal and erroneous and fraudulent practices of the said respondents, and that the said judicial proceedings declared to be utterly fraudulent and of no effect as against your orator, and that the said estate of your orator in the custody of the said Buckners, by reason of such judicial proceedings, shall be restored to your orator, and the said Simon B. Buckner and Mary K. Buckner treated as trustees *ex maleficio* of your orator and be compelled to yield up the possession of the property seized upon by them, and execute proper releases to your orator and account to your orator for the income and issues therefrom, and that the said Simon B. and Mary K. Buckner and all claiming under them shall be perpetually enjoined and restrained from setting up any title to said property or interfering with the same in any manner under color of such judicial proceedings as aforesaid."

There is a special prayer for a temporary injunction, and a prayer for general relief.

It appears by the bill itself that the main decree entered by the Circuit court November 13, 1871, was in obedience to the special directions of the Supreme court, given on reversing and remanding the cause, and this is the principal decree which it is sought to impeach by this bill, for error apparent upon the face of the record, and on account of alleged collusion and fraud; this being so, a demurrer would raise the question as to whether the Circuit court of the state could review the proceedings resulting in a decree entered upon the mandate of the Supreme court, which is a court of last resort. But two of the defendants, one of whom appears by the allegations of the bill to be a party defendant, withdrew their demurrer and interposed a special plea in bar, in which the proceedings in the Circuit court and Supreme court are fully set forth.

The plea sets forth the filing of the original bill July 19, 1870, by Henry W. Buckner, by his next friend, wherein the complainant claimed that he was the owner in fee, by inheritance of *the whole* of the real estate described in the bill, as heir at law of his father, who had actual title to an undivided one-half, through a deed executed by Simon B. Buckner and Mary K. Buckner, dated May 15, 1861, and prayed that his title of inheritance to *the whole* of said property should be *confirmed and established;* that an answer was filed by Mary K. Buckner and Simon B. Buckner, in which they denied that Henry W. Kingsbury was the owner of the *whole* of the said real estate, but on the contrary averred that Mary K. Buckner was the equitable owner of an undivided one-half, and that the deed was a conveyance in trust, not intended to vest any beneficial interest in the deceased Henry W. Kingsbury. And on the same day

they filed their cross-bill, in which it was alleged that the deed was executed without the knowledge of the grantee, who remained ignorant thereof for several weeks, and that it was made without any consideration, contract, arrangement, bargain or promises whatever, and that the sole purpose was to vest the property, in trust, and it was averred that Henry W. Kingsbury, in his life-time, declared said trust, by his will, and also in a letter written by him on the 23d day of October, 1861, to his mother, Jane C. Kingsbury, and in the conversation referred to in his letter, and they prayed that the deed be declared a deed of trust; that the property be reconveyed, and for further relief. The proceedings are further set forth, resulting in a dismissal of both bills, appeals to the Supreme court and assignment of errors therein, by both appellants.

The plea then avers as follows: "And they further say that such proceedings were had in said causes in said Supreme court, that on the 5th day of October, A. D. 1871, the said decree of the Circuit court was reversed and said causes remanded to said Circuit court with directions to that court to dismiss the original bill absolutely and to grant the relief prayed in the cross-bill by a decree establishing the equitable title in said Mary K. Buckner to her proper share in all said real estate, and declaring the said trust and requiring the proper conveyance of the legal title to her *divested of any life estate in her husband*, said Simon B. Buckner (he having renounced the same), and of right of dower in Eva Lawrence; that an account be taken between said Mary K. Buckner and all other parties interested in the estate of Julius J. B. Kingsbury, deceased, according to the rules and practice of the court of chancery in such cases, and that it be de-

creed accordingly; and the said Supreme court, on said 5th day of October, A. D. 1871, filed its opinion in said causes, wherein it decided that said deed of the 15th day of May, A.D. 1861, executed by said Mary K. and Simon B. Buckner to said Henry W. Kingsbury, deceased, was a conveyance of said property in trust for the benefit of said Mary K. Buckner, and that such trust was sufficiently manifested and proved by writing signed by said Henry W. Kingsbury, the party who was by law enabled to declare it, and that it must be executed." (Rec., 185.)

The plea then avers that the cause was redocketed in the Circuit court and upon the mandate of the Supreme court on the 13th day of November, 1871, a final decree was entered containing the provisions directed by the Supreme court, ordering a conveyance to Mary K. Buckner *free from any title or claim of her husband, Simon B. Buckner*, and subject to the dower interest of Jane C. Kingsbury.

This decree appointed commissioners to make partition of the property in accordance with the provisions of the statute of Illinois, which statute provided for vesting the title in the several tenants in common by decree without mutual conveyances. The plea then sets forth the action of the commissioners making partition and allotment to Henry W. Kingsbury and Mary K. Buckner. Exceptions were filed, which were overruled, except as to the "Spencer" tract, and as to that the exceptions were postponed, with leave to take further evidence. The report and partition was confirmed, with this exception, by a decree entered January 29, 1872, which decree invested Henry W. Kingsbury with the title in fee simple of the property allotted to him, subject to the rights of dower of Jane C. Kingsbury and Eva Lawrence, and invested

the said Mary K. Buckner with the title in fee simple to the property allotted to her, subject to the dower of Jane C. Kingsbury.

The plea sets forth the issue and execution of a writ of assistance in pursuance of the decree.

The plea sets forth a further decree entered August 2, 1872, which overruled the exceptions as to the "Spencer" tract and cofirmed the partition as to that.

It also shows an appeal to the Supreme court by Henry W. Kingsbury, by his guardian *ad litem*.

The bill then sets forth that on the 11th day of September, 1872, Henry W. Kingsbury in prosecuting his appeal, filed in the Supreme court a transcript of the record and made an assignment of errors as follows:

1. The court erred in rendering the decree of November 13, 1871.

2. That the said decree of November 13, 1871, was rendered without proof against the said infant, Henry W. Kingsbury, and is contrary to law.

3. That the said decree of November 13, 1871, is not in accordance with the mandate of the Supreme court, and was rendered without jurisdiction in the said Cook Circuit court.

4. That the court below erred in finding that there were incumbrances upon the property described in the said decree without having the incumbrances before the court, and without any evidence as to the existence, nature, validity, extent, or amount of such incumbrances or any of them.

5. That said decree of November 13, 1871, ordering a partition, is wholly indefinite and void in this, that it orders the said commissioners in partition to take into

consideration the encumbrances on the said premises without any adjudication as to the amount, extent, validity, or nature of such encumbrances or any of them.

6. The court erred in decreeing any partition of said property without decreeing as to the said encumbrances and specifically decreeing their nature, validity, extent and amount.

7. The court below erred in making said decree without disposing of the interest of said doweresses, Jane C. Kingsbury and Eva Lawrence.

8. The court below erred in receiving or acting upon the pretended report of the commissioners in partition at the January term, 1872.

9. The land divided by the commissioners is not the same premises described in the decree, and the said commissioners had no warranty or authority to divide the same, nor was the same embraced within their oath.

10. The said commissioners had no authority under the law or said decree of partition to determine the existence, validity, extent or amount of the encumbrances mentioned in their said report, or any of them.

11. The said commissioners had no authority under the law or said decree to apportion said incumbrances specified in their report, or any of them.

12. The said commissioners had no authority under law or said decree to find or report that interest had not been paid on said encumbrances or any of them, or from what source the said interest had been paid.

13. The said report of said commissioners is indefinite and void as to the subject of encumbrances and interest.

14. That the court erred in confirming said report of commissioners in partition.

15. The court erred in rendering any decree of confirmation without preserving in the record the evidence upon which such decree was based.

16. The court erred in overruling the exceptions filed to the said report of commissioners.

17. The court erred in making any decree of partition or allotment of the encumbrances specified in such decree when the cross-bill of the said Mary K. and Simon B. Buckner had no allegation concerning such encumbrances and had no prayer for the allotment of such encumbrances.

18. The court erred in rendering any decree as to the said insurance moneys set forth in the latter clause of said decree of January, 1872.

19. The court erred in ordering a receiver appointed in another cause to make any report in this cause.

20. The court erred in decreeing that the receiver in another cause should pay over money to Mary K. Buckner.

21. The court erred in decreeing payment of the insurance money in the hands of said receiver without reference to the payment by him made.

22. The court erred in decreeing costs against the said infant, Henry W. Kingsbury.

The plea further avers, that upon the hearing of the said cause in the Supreme court Henry W. Kingsbury, by his guardian *ad litem*, made the following points or objections to the proceedings of the Circuit court:

" I. The court had no jurisdiction over the infant to render the decree of November 13, 1871, on the so-called cross-bill.

"II. The decree of November 13th was rendered without sufficient proof against the infant.

"III. The decree of November 13, 1871, was collusively obtained against the infant, and is manifestly unjust."

And he specified as evidence of fraud on the part of Corydon Beckwith, former solicitor and guardian *ad litem* of said Henry W. Kingsbury in and about the proceedings whereby the said decree of November 13, 1871—and asked the court to consider:

"That the guardian *ad litem* agreed to an illegal notice to take Buckner's testimony.

"He made no objection to the deposition, when returned under a void commission.

"He made no objection to the incompetency of Buckner to establish a trust for himself and wife by his own oath.

"He made no objection for the infant to a single interrogatory propounded to Buckner.

"He accepted an illegal notice to take Barrett's testimony and made no objection to it when returned.

"He made no objection to the general incompetency of the witnesses Jane C. Kingsbury and Burnside or specifically to any single interrogatory.

"He consented to the taking the depositions of Woodbridge, Shortall and Mitchell, in a manner not authorized by law.

"No process or publication was ever taken out on the bill of the infant. The litigation was conducted in all respects like an agreed case.

"The guardian *ad litem* called no witnesses and cross-examined none.

"He consented to and expedited, a final hearing on the very day the issues on the original bill were closed by replication, when, under the law, the cause did not stand for hearing until the next term, sitting the third Monday in January.

"He consented to and expedited *pro forma* decrees in the court below, so that, in fact, there never was any *bona fide* hearing.

"He permitted the cross-bill to be tampered with after issue joined upon it, and without the authority of the court by importing into it new and important matter, thereby causing his ward's interests to be tried by a false record.

"Instead of requiring the cross-complainant to follow what the court has termed "the proper and convenient practice," and procure a reference to the master to take the evidence and report the facts, he habitually promoted the taking and use of *ex parte* depositions in distant states before official commissioners, and with every opportunity to fabricate and distort testimony.

"He consented for some reason not of record, that a false date should be given of the final hearing and decree, instead of the true one.

"Instead of requiring the infant's adversaries to appeal in the ordinary manner required by law, he consented his ward's case—into a court sitting in four days thereafter.

"He filed no abstract of record, allowing the cross-complainant to submit the cause upon an abstract which concealed from the court all knowledge of the divers irregularities committed in taking the depositions relied on.

"He failed to bring the infant's whole defense to the notice of the court or to assign proper errors.

"The cross-complainants profited by this collusion or gross neglect on the part of the representative of the infant, and are now in the possession of the fruits of the victory over this matter by inactivity.

"IV. The decree of November 13, 1871, is contrary to law.

"VI. The decree of November 13, 1871, is indefinite and erroneous as regards incumbrances.

"VII. The report of the commissioners in partition was illegal, and the court had no authority to receive or act upon it.

"VIII. The decree of the Circuit court, receiving and acting upon the illegal report of the commissioners was void.

"IX. The court erred in directing a receiver in another cause to report in this cause, and in ordering such receiver to pay out funds in his hands to Mrs. Buckner.

"X. It was error for the court below to overrule the special exceptions and decree a partition of the property alluded to as the Spencer mortgage tract.

"XI. It was error to decree costs against the defendant."

(Rec., 187, 188 and 189.)

The plea then avers that on the 24th of May, 1873, the Supreme court rendered its decision reversing the last decree of the Circuit court, and that on an application of Mary K. Buckner for a rehearing, the court, on the 8th day of November, 1873, delivered another opinion and entered judgment by which the court affirmed all of the decrees except that of August 2, 1872, which was reversed and the cause remanded for further proceedings in conformity with the opinion.

It is also shown by the plea that a motion was made in

the Supreme court on the 20th of January, 1873, to set aside the judgment of reversal rendered in October, 1871, and to recall the mandate issued to the Circuit court, and dismiss the appeal, which motion was denied by that court.

The plea avers that on the 7th day of March, 1877, the death of Mary K. Buckner was suggested in said original cause, and Lily Buckner, her daughter and heir at law, was substituted as party complainant in the cross-bill in her stead, and on the same day a further and final decree was entered in accordance with the last opinion of the Supreme court.

The plea concludes with a denial of all the allegations as to fraud, misrepresentation or collusion.

An answer was filed which denied all of that portion of the bill which charged fraud and collusion.

It thus appears from these pleadings that the subject-matter of controversy was lots 5 and 6 in block 35, original town of Chicago, and also a tract of thirty-five acres, more or less, situate in Chicago, known as "Kingsbury Tract"; that Major Julius J. B. Kingsbury was the owner of this property who died June 26, 1856, leaving Jane C. Kingsbury, his widow, Mary K. Buckner, a daughter, and Henry W. Kingsbury, a son, and that these children inherited the title to the property subject to the right of dower of the widow, each owning an undivided one-half. It further appears that the controversy was in regard to the title to the undivided one-half of Mrs. Buckner, and this arose because of the execution of a deed of May 15, 1861, by Mrs. Buckner and her husband to Henry W. Kingsbury. The question was as to whether such deed was in trust for the use of Mrs. Buck-

ner, and connected with that question was one as to the evidence to sustain the contention that the deed was not an absolute conveyance, but only in trust, the statute requiring that a trust should be evidenced by a writing signed by the party to be charged therewith.

It further appears that the controversy was submitted on final hearing to the Circuit court of Cook county, and that a decree was entered December 31, 1870, by that court dismissing the original and also the cross-bill; that an appeal was taken from this decree to the Supreme court of the state, which was one of last resort, by Henry W. Kingsbury, and also by Simon B. Buckner and Mary K. Buckner; that the decree of the Circuit court was reversed and the cause remanded, by a judgment entered October 5, 1871; the opinion of the court being found in the 58th Illinois, 310; that the Supreme court gave specific directions to the Circuit court to enter a particular decree dismissing the original bill absolutely and to grant the relief prayed by the cross-bill; that the Circuit court in obedience to the mandate of the Supreme court, on November 13, 1871, entered the decree which established the right of Mrs. Buckner to an undivided one-half of the property free from any claim or title of her husband and from the dower claim of Mrs. Lawrence, deciding that the deed of May 15, 1861, was a deed of trust; that in execution of this particular decree three other orders or decrees were entered, the last of which on August 2, 1872; that Henry W. Kingsbury prayed a second appeal to the Supreme court assigning as errors the same matters now claimed by the bill in this case to be error, and among others the entry of the decree of November 13, 1871, questioning the jurisdiction of both the Circuit and Supreme courts; that while said second ap-

peal was pending, a motion was made in the Supreme court January 20, 1873, at Springfield, to set aside the judgment of reversal entered October 5, 1871, to recall the mandate issued to the Circuit court to dismiss the appeal upon the alleged ground that the appeal was taken upon a forged record, and the want of jurisdiction, which motion was subsequently denied by the Supreme court; that on the 24th of May, 1873, the court entered a judgment on the second appeal reversing and remanding the case holding the decree of August 2, 1872, to be erroneous; that subsequently on a petition for rehearing by Mary K. Buckner, the court vacated this judgment and entered one confirming all the decrees, including that of November 13, 1871, except the decree of August 2, 1872, which was reversed; that decree relating to the parcel of land to which Mrs. Buckner had no title.

The bill in this case was filed after the decision of the Supreme court denying the motion to enter the original judgment of reversal, and after the judgment of the Supreme court on the second appeal.

The defendants who plead and answered did not admit any of the averments of the bill. All of that portion which alleged a procurement of the decrees by fraud and collusion was denied. All of that part of the bill which alleged error in the proceedings was answered by setting up the judgments of the Supreme court of Illinois.

The complainant offered no evidence whatever, but he may be entitled to the benefit of whatever testimony was offered by the defendants.

The averments of the plea were strictly proved by the production of certified copies of the former proceedings.

By that record the certificate of evidence on the first hearing is shown. At the end of it, the following paragraph appears:

"And the court, on objections being made to the competency of the evidence in each of the foregoing depositions contained, thereupon received them in evidence herein, subject to all legal objections going to the sufficiency, competency and relevancy thereof under the pleadings in the said original and cross-cause, no objections being made, however, to copies of papers produced and read in place of the original thereof." (Rec., 352.)

In the testimony taken by the master, and reported by him, the argument for appellant, Henry W. Kingsbury, on the second appeal appears. It is printed in this court as an additional record, it being "Exhibit D." The argument appearing in the transcript as filed with an affidavit of Wherland attached, was inserted by mistake, and it should be disregarded on this hearing. The errors assigned are to be found on the record, "Exhibit C," page 377, and they have already been copied in this statement.

By these errors and the argument of counsel, it appears that the points were made (1), that the court had no jurisdiction over the infant to render the decree of November 13, 1871, on the so called cross-bill; (2) that the decree of November 13th was rendered without sufficient proof against the infant; (3) that the decree of November 13, 1871, was collusively obtained against the infant, and is manifestly unjust—collating and referring to the evidence appearing of record tending to sustain this point, and among these the want of sufficient notice in taking depositions, the incompetency of Buckner and others as witnesses, and the alleged neglect of the guard-

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ian *ad litem* in not properly presenting the infant's case, claiming from these facts appearing of record that there was sufficient evidence of collusion and fraud; (4) that the decree of November 13, 1871, is contrary to law, and under this head claiming that no trust had been established; and (5) alleging other errors as to the subsequent decrees.

The first opinion of the Supreme court is reported in the 58th Illinois, at page 310, and was offered in evidence, but is not copied in the record.

The opinion shows that the court decided that the deed of May 15, 1861, was not accepted and was not delivered until about the 8th of July of that year, when Henry W. Kingsbury, the grantee, was first informed of its existence by Buckner, in an interview held in Washington. The court further held that there was no implied trust created by it, but there was an express trust, holding that the provisions of the will of Henry W. Kingsbury, made March 25, 1862, and the statements of a letter written by Henry W. Kingsbury to his mother, October 23, 1861, taken in connection with a prior conversation between them, referred to in the letter, substantially established the trust, under the rule of law permitting the introduction of parol testimony in explanation of such trust, and taking the whole together with the proof, it was sufficient to show that the deed was made in trust for the use and benefit of Mary K. Buckner, the sister of Henry W. Kingsbury, the grantee.

The concluding portion of the opinion is as follows:

"From the best investigation we have been able to give to the question, and the authorities which bear upon it, we have arrived at the conclusion, that inasmuch as the

written evidence clearly establishes the existence of a trust, parol evidence of the words referred to in the letter is admissible for the purpose of describing or defining what was meant by the letter, as showing the truth of the transaction.

"To search for artificial rules by which to exclude such evidence, beyond the just demands of the statute of frauds, would be an attempted removal of some of the most favorite maxims of courts of equity; would be the exercise of astuteness in the ways of defeating the plain intentions of the parties, and aiding in the consummation of a fraud; for, when a trust is once established by legal evidence, equity regards every attempt by the trustee to appropriate the trust property to himself, to the exclusion of the rights of the *cestui que trust*, as a fraud, contemplated upon the latter.

"The late Henry W. Kingsbury was, as this case shows, not only a trustee of the property, for his sister, but he was an honest trustee. By the last act of his life, in this respect, he designed to, and did, admit the existence of the trust, and endeavored to execute it. Immediately after his death, his widow, one of the defendants, in a letter to the mother of her deceased husband, recognized and admitted the trust, so far as she was concerned, in the most express terms, and seemed distressed at the suggestion of any obstacle to its immediate execution. Though her relations in life, and to the *cestui que trust*, became afterwards changed by another marriage, yet it is incredible that if she has been cognizant of the efforts which have been made to conceal the most important item of evidence of her former husband's relation to this vast property, and to wrest it from its proper channel, she can view them otherwise than with feelings of sorrow

and regret. Her conduct has been the subject of severe criticism by counsel, but we are inclined to believe that she, like the unconscious infant whose name appears as plaintiff in the original bill, is but the involuntary instrument in the hands of designing men, who stand in no such relation to the memory of the deceased trustee as does Eva Lawrence.

"The trust being sufficiently manifested and proved by writings, signed by the party who was, by law, enabled to declare it, it must be executed.

"This conclusion renders unnecessary any discussion of the question made by appellants in the cross-bill, as to the sufficiency of the acknowledgment of the deed by Mary K. Buckner, or of the question made by appellant in the original bill, as to the execution and probate of the will; because, if properly executed and admitted to probate, the will would be governed by the laws of this State, where the property is situated; and the posthumous birth of the infant Henry W. Kingsbury, would, by those laws operate as an abatement of all devises of property so situated. (Gross' Statutes, p. 800, Sec. 16, Wills.) Besides, the testator was incapable of divesting the property held in his name, for the use of Mary K. Buckner, by any devise he could make.

"The decree of the court below, dismissing both bills without prejudice, must therefore be reversed and the causes remanded, with directions to that court to dismiss the original bill absolutely, and to grant the relief prayed in the cross-bill, by a decree establishing the equitable title in Mary K. Buckner, to her proper share of the real estate described in the deed of May 15, 1861, declaring the trust, and requiring the proper conveyance of the legal title to her, divested of any life estate in her hus-

band, (he having renounced the same,) and of all right of dower in Eva Lawrence; that an account be taken between said Mary K. Buckner and all other parties interested in the estate of Julius J. B. Kingsbury, deceased, according to the rules and practice of the court of chancery in such cases, and it be decreed accordingly." (58 Ill., pp. 336, 337, 338.)

The opinion of the Supreme court on the second appeal was offered in evidence, but is not copied in the record; it appears in the 70th Ill., at page 515. The first portion of that opinion reads as follows:

"This case was before the court at a former term. As we shall not go behind the decision then made, it is necessary to understand it. The cross-bill of the Buckners, upon which the decision was based, was for the purpose of having a trust declared, a re-conveyance of real estate, and a partition. The court then decided that the deed from Mary K. Buckner and husband to her brother was not originally properly delivered to be effectual, but that it became operative by the subsequent act and declarations of the parties; that there was an express trust manifested, and the decree of the court below dismissing the bill was reversed, and the cause remanded, 'with directions to dismiss the original bill absolutely, and to grant the relief prayed for in the cross-bill, by a decree establishing the equitable title in Mary K. Buckner to her proper share in all the real estate,'" etc.

"Every question was then settled and became *res adjudicata*, except the actual interest of Mrs. Buckner in real estate. This was subject to future inquiry and additional evidence. It was directed that she should have "her proper share," and this must be ascertained by the court below. It was not definitely fixed and determined

by the former opinion. If her father, before his death, had alienated a portion of the property, she could not inherit such portion, and it would form no part of her proper share.

"A labored argument has been made to prove the error of the former decision of the court, and it is charged that fraud and collusion were practiced, and incompetent testimony adduced, to obtain it. If this were true, we cannot determine questions so grave upon *ex parte* affidavits. If there have been fraud and collusion, the proper remedy would be in chancery, and then the parties assailed could have an opportunity of making a defense; or, if the decree is directed by the court of final resort, by an application for a rehearing.

"Upon the former hearing, after full argument, this court decided that Henry W. Kingsbury held the property conveyed by the deed from Mrs. Buckner and husband to him, as trustee; that the trust had been manifested by a writing, and that she had an equitable title to a share in the estate. The cause was remanded to ascertain her share, and not to determine the trust. The latter had been established by the declaration of this court. This appeal is prosecuted from the decree making partition, and can bring before us no other question, except questions incident to the order for partition. We cannot examine as to the merits of the original case, but only as to proceedings subsequent to the decision at the former hearing. If the course suggested and so strenuously insisted upon by the counsel for appellant, was pursued by Appellate courts, litigation would never cease, new counsel, as in this case, would make new arguments and present additional points for adjudication, and the most resolute persistance would finally settle the rights of the par-

ties. The appellate power of this court would then be exercised more over its own proceedings and judgments than those of inferior courts.

"The trust relation between the parties was established by the former decision and the court has not the power to reverse it. We might overrule it, but this would manifest a vacillation which would destroy all respect for the court. The proper mode would have been an application for a rehearing in apt time, and then the suggestions now made would have been entitled to consideration.

"This is the doctrine of the courts, as definitely settled by repeated decisions: *Hallawbush* v. *McConnell*, 12 Ill., 203; *Washington Bridge Company* v. *Stewart*, 3 How., 413; *Brawder* v. *McArthur*, 7 Wheaton, 58; *Southard* v. *Russell*, 16 How., 547; *Roberts* v. *Cooper*, 20 How., 467.

"After remandment of this cause by this court, the court below rendered a decree in accordance with the mandate of this court, and appointed commissioners to inquire as to incumbrances upon the property, and to make partition." (70 Ill., 515, 516, 517.)

The court then proceeded to discuss the questions arising subsequent to the decree of November 13, 1871, and held that there was error in including the tract of land known as the Spencer tract in the partition proceedings, and for this reason decided that the decree must be reversed, and concluded with some suggestions as to proceedings in the court below.

The petition for rehearing was presented, and it was allowed. when the court delivered the following opinion:

"PER *Curiam:* A rehearing was ordered in this cause upon the present appeal, not for the purpose of re-

considering the case upon the merits, or to change, or, in any substantial sense, to modify our former decision, but to render the opinion of the court more explicit, and prevent misconception of its meaning. This seems demanded by the peculiar state of the record, which was inadvertently overlooked, and the language employed in the opinion to which our attention has been called by the application for a rehearing. When the cause was before us upon a former occasion, the principal questions involved were definitely settled. The decree of the court below, dismissing both the original and cross-bills, was reversed, and the cause remanded, with directions to grant the relief prayed by Mrs. Buckner's cross-bill. (58 Ill., 310.) In pursuance of those directions, a decree was entered in the Circuit court November 13, 1871. This decree established the principal rights of the parties, and the court proceeded to carry them into effect, which involved the necessity of entering three subsequent decretal orders, and on August 2, 1872, another and final decree. This decree disposed of a controversy arising between the parties upon proceedings for partition, involving a claim by Mrs. Buckner to a share in what is called the 'Spencer tract,' as a part of her father's estate, and by that decree her claim was allowed, from which an appeal was taken on behalf of the infant, Henry M. Kingsbury, to this court. No appeal was taken from the decree of November 13, 1871, but appeals were taken from some of the decretal orders intervening that and the final decree of August 2, 1872.

"Upon these appeals the whole record was brought to this court, and errors assigned, questioning the propriety of the decree of November 13, 1871, entered in conformity with the direction of this court, some of the in-

tervening orders, and the final decree of August 2, 1872. The questions raised and attempted to be raised were all carefully considered, and the conclusion arrived at was, that no error could be assigned upon the first decree, entered in pursuance of the direction of this court, that the points made upon the intervening orders were not well taken, but that the decree of August 2, 1872, was erroneous, and ought to be reversed, for the reasons given in the opinion. These views, however, are not clearly announced in the former opinion, and it follows also that the directions contained in the opinion which have no relation to the matters involved in the decree of August 2, 1872, are wholly inappropriate, and may be considered as withdrawn from the opinion.

"The judgment which we intended to enter was, that the several decrees and decretal orders antecedent to the final decree of August 2, 1872, and upon which, error was assigned, be affirmed, but that the decree of August 2, 1872, concerning Mrs. Buckner's claim in the Spencer tract, be reversed, and the cause remanded, for further proceedings in conformity with the former opinion, as herein explained, and modified, and that each party pay half of the costs in this court."

(70 Ill., 521, 522, 523.)

On this proof the court below could not do less than find the averments of the plea proven. As its sufficiency was not questioned, the court was obliged to find the issue for the defendants.

As to that portion of the bill which alleged collusion and fraud, as there was no evidence except such as might be furnished by the record itself, the Supreme court of the state having held that these were not errors which

justified a reversal of the former decree, *a fortiori*, they could not be received as sufficient evidence to prove the collusion and fraud alleged in the present bill.

In concluding this statement, I call the attention of the court to the fact that it has never been claimed through all these proceedings, and is not now claimed, that Henry W. Kingsbury, deceased, paid to Mary R. Buckner any consideration for said deed. It has been sufficiently admitted at all times, and is now by the argument of counsel, that the deed was made without consideration with the expectation that Mrs. Buckner would be allowed to recover the property, and that Henry W. Kingsbury intended to return it and made an attempt by his will to do so, which only failed because of a revocation by the birth of a posthumous child. The effort has been, and is, to enable the present appellant to retain Mrs. Buckner's property because of rules of law which counsel assert are sufficient to enable him to perpetrate the fraud by retaining the property which he does not own.

Additional Statement, Correcting Judge Trumbull's Mistakes.

Since writing the foregoing, I have been furnished with a statement and argument by Judge Trumbull, and it seems to be necessary to point out some mistakes contained in it and make proper corrections. It is more appropriate to insert the reference to them here than in my argument.

It is claimed that the plea was not proved. (*Trumbull's Argt.*, 34.)

This record shows that all of the files and records of the

original suit in the Circuit court were destroyed in the great fire of October 9, 1871, and that they were restored by filing a certified copy of the transcript in the Supreme court. The exhibit attached to the bill in this case shows notice served on Beckwith, Ayer & Kales, solicitors for complainant in the original bill, and defendants in the cross-bill, and on Corydon Beckwith next friend and guardian *ad litem* for Henry W. Kingsbury, minor, that a motion would be made on the 4th of November, 1871, for leave to file the annexed record in place of and as a substitute for the record and papers lately destroyed by fire. (Rec., 29, 30.) Then follows a certified copy by the clerk of the Supreme court, which is made a part of the bill. (Rec., 10.) A certified copy of the substitute with the notices were offered in evidence in support of the plea. (Rec., 207.) The order in pursuance of such notices was entered November 4, 1871. (Rec., 356, 357.) This order recited that proof was made to the court that due notice had been given by the parties making the motion to all the other parties according to the rules and practice of the court.

The rule of the Supreme court of Illinois, like that of this court, does not require a complete copy of a record to be incorporated in a transcript filed in prosecuting an appeal, but only such parts and so far as may be material. It follows that many things not regarded as material are omitted. It is seldom the practice to include commissions to take depositions, or the beginning or ending, or certificate, merely copying interrogatories and answers, or to include other papers which are not pertinent to the questions to be presented on the appeal.

So in this case it is quite certain that portions of the papers were omitted. Again it is quite common to find

clerical mistakes in a transcript, and frequently a wrong date. When the printing is done typographical errors occur.

After the fire, which destroyed all of the business part of Chicago, including all public records, the best substitutes for restoration attainable, were used. But presumptions in favor of judicial proceedings were a necessity, and no appearances of minor mistakes or want of papers or parts of record have been allowed to prevail. Any other course would have been destructive of important private and public rights.

The transcript from the Supreme court was the best substitute that could be obtained in this case, but it was by no means perfect as to details.

Some of the points made by Judge Trumbull are met by these considerations.

An example occurs in Judge Trumbull's argument, page 34, where he called attention to the allegation of the plea that the cause was heard December 31, 1870, and a decree rendered as of the 24th of the same month, and then asserts that this allegation is not proved because the record shows that the hearing was on the 24th of December, referring to page 265 of the record. In other parts of his argument he many times says the decree was entered on the 24th, and at the bottom of page 4, he states that the deposition of Mrs. Kingsbury was taken December 28th, four days after the hearing. Now what are the facts. It is true that the clerk, in making his transcript, by way of putting in a connecting link says that on the 24th day of December, 1870, the following proceedings were had and then sets out the final decree from which the appeals were taken. Judge Trumbull has this sup-

port and no more.' But by reading the decree itself, we find the following: "And it is further ordered that this decree be entered as of the 24th of December, 1870." This shows the hearing was on a subsequent day and if a full transcript had been made such day would have appeared. We find the certificate of evidence was signed on the 31st day of December, 1870. (Rec., 266.) The bill in this case alleges that the hearing was on the 31st day of December, 1870, and a final decree entered as of the 24th. (Rec., 9.) That fact is made the basis of the claim for error by all counsel preceding Judge Trumbull, and it remains for him to claim that depositions were taken and inserted in the record after the decree was actually entered.

Judge Trumbull claims a failure to prove the averment that the cause was redocketed on the mandate of the Supreme court, October 31, 1871, and that the only evidence of filing the mandate and redocketing was in the decree of November 13, 1871, of which the guardian *ad litem* had no notice. (Arg., 35.) The case was redocketed and the mandate was filed, and the guardian had notice, it is quite immaterial as to the day on which it was done. As before stated the case was in court and notice was served of a motion November 3d, and the court found by the order entered November 4th that all parties were in court. It may be presumed that the case was properly reinstated. The decree of November 13, 1871, says it was.

Judge Trumbull says in substance there is no proof of a second appeal to the Supreme court from the decree entered in pursuance of the directions of that court, or from any subsequent decree, and particularly none from an order of August 2, 1872, nor any evidence that

any such decree was ever entered. He also says that there is no evidence that the Supreme court had affirmed the decrees prior to that of August 2, 1872. (Arg., 34, 42.) For these reasons, he claims that the opinion in 70 Illinois, 514, rendered on the second appeal cannot be considered by this court.

On examination of the record I find that it does not contain the decree of August 2, 1872, and there is that much foundation for Judge Trumbull's position, and no more.

The evidence reported by the master shows a decree of November 13, 1871 (Rec., 358); the report of the commissioners making partition (*Ib.*, 361); a decree confirming the report with other provisions (*Ib.*, 368); an executed writ of assistance in pursuance of that decree (*Ib.*, 373); a judgment of the Supreme court May 24, 1873, in an appeal of Henry W. Kingsbury, by his guardian Anson Sperry *vs.* Mary K. Buckner and Simon B. Buckner, reversing the decree of the Circuit court of Cook county and remanding the cause (*Ib.*, 375); an order September 19, 1873, allowing a rehearing on application of the appellees (*Ib.*, 375); a judgment in the same case entered November 8, 1873, *affirming all orders and decrees* entered by the Circuit court of Cook county prior to August 2, 1872, and reversing the decree of August 2, 1872, and remanding the cause (*Ib.*, 376). To these is added the certificate of the clerk of the Supreme court of the Northern grand division that the foregoing is a true copy of proceedings in an appeal of the above entitled cause (Henry W. Kingsbury by his guardian Anson Sperry *vs.* Mary K. Buckner, Simon B. Buckner and Jane C. Kingsbury), the appeal being entered September 11, 1872, in said Supreme court (Rec., 376).

The master's report also contains a certified copy of the assignments of error in the same case. (Rec., 377.) These errors have been previously copied in this statement. They question the decree of November 13, 1871, the decree of January 25, 1872, confirming the partition, and other decrees, without giving the date of them, among which was that of August 2, 1872.

The master's report also includes the points and argument of Henry Crawford, solicitor for Henry W. Kingsbury and his guardian, which is printed as an additional record.

This argument claims there was error in the decree of November 13, 1871 (Addn. Rec., 6); that said decree was rendered without sufficient proof (*Ib.*, 10); that it was collusively obtained (*Ib.*, 19); that it was indefinite and erroneous as regards encumbrances (*Ib.*, 35); that the report of the commissioners in partition was illegal, etc., (*Ib.*, 37); that the decree confirming the report was illegal and void (*Ib.*, 39); that the court erred in directing the receiver in another cause to report in this cause, and ordering such receiver to pay out the funds to Mrs. Buckner (*Ib.*, 39). After making these points as to the decree entered in pursuance of the mandate of the Supreme court, and subsequent decrees thereto, the decree of August 2, 1872, was taken up, and it was insisted that it was error for the court to overrule the special exceptions, and decree a partition of the property alluded to as the Spencer tract. (*Ib.*, 40.) In addition, the two opinions of the Supreme court, rendered upon the second appeal, are in evidence, no objection having been made to them.

It appears from the last opinion that there were three decrees entered after that of November 13, 1871, to carry into effect the last named decree and that on August 2, 1872, another and final decree was entered, which decree disposed of the controversy in regard to the "Spencer tract," and that appeals were taken from the decrees, including that of August 2, 1872, entered subsequent to that of November 13, 1871. It is further stated in the opinion that upon these appeals the *whole* record was brought to this court and errors assigned questioning the propriety of the decree of November 13, 1871, entered in conformity with the direction of the court, some of the intervening orders and the final decree of August 2, 1872. The court stated that it was their intention in the former opinion to direct that judgment be entered affirming all of the decrees except that of August 2, 1872, and as to that, that it be reversed and the cause remanded for proceedings in conformity with the opinion which was, that the Spencer tract belonged exclusively to Henry W. Kingsbury.

The master's report shows that an order was offered in evidence which reads as follows:

"Henry W. Kingsbury, by his guardian, Anson Sperry,
vs.
Mary K. Buckner, Simon B. Buckner and Jane C. Kingsbury.

80. Appeal from the Circuit Court of Cook County.

On this day again came the said parties, and the court, having diligently examined and inspected as well the record and proceedings aforesaid as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, are of opinion that

in the record and proceedings aforesaid, and in the rendition of all the orders and decrees rendered and entered in said cause by the said Circuit court of Cook county prior to the 2d day of August, A. D. 1872, there is no error. Therefore it is considered by the court tha tthe said orders and decrees so rendered in the proceedings aforesaid, prior to the 2d day of August, 1872, be, and the same are, in all things confirmed.

And the court being further of the opinion that in the rendition of the decrees in the record and proceedings aforesaid on the 2d day of August, A. D. 1872, there is manifest error.

Therefore it is considered by the court that, for that error and others in that record and proceedings aforesaid, the decree so rendered on the 2d day of August, A. D. 1872, by the Circuit court of Cook county, be reversed, annulled and set aside, and for nothing wholly esteemed and that this cause be remanded to the Circuit court of Cook county for such other and further proceedings as to law and justice shall appertain.

And it is further considered by the court that said appellant recover one-half of the costs of and from the appellees, and have execution therefor, and that the appellees recover one-half the costs from the appellant, and have execution therefor.

I, Cairo D. Trimble, clerk of the Supreme court in and for the Northern grand division of the State of Illinois, do hereby certify that the foregoing is a true copy of the mandates and decrees of court below, commissioner's report, writ of possession, judgment of this court, order for rehearing, and second judgment thereon, contained in the transcript of proceedings of the Circuit court of the

county of Cook, filed on appeal entered September 11, A. D. 1872, in the said Supreme court in the above entitled cause, of record in my office.

In testimony whereof I have set my hand and affixed the seal of said Supreme court, at Ottawa, this 10th day of May, in the year of our Lord one thousand eight hundred and seventy-eight.

Seal of the Supreme Court.

C. D. TRIMBLE,
Clerk of the Supreme Court."

(Rec., 376.)

While it appears to be true that by some inadvertence a certified copy of the decree of August 2, 1872, does not appear in the evidence introduced before the master, and that for the want of such copy it was not technically proved that an appeal was prayed by the guardian of Henry W. Kingsbury and allowed, yet, it is abundantly proven that there was such a decree, as well as three others preceding it, from which appeals were prayed and allowed; that a transcript of the *whole* record was filed in the Supreme court, and errors assigned thereon by the guardian of Henry W. Kingsbury; that his counsel was heard in support of such alleged errors, and the cause was decided upon a second appeal.

The proof was taken before the master in the presence of John V. Lemoyne, who was not only guardian *ad litem*, but actual guardian of the person and property of Henry W. Kingsbury. No objection was made before the master, or before the court. It is too late to raise a question as to such a defect in the proof for the first time in this court, on an appeal thirteen years after the cause was finally disposed of. There can be no doubt whatever as to the fact that the defect could be instantly supplied

in this court, if the rules permitted it, or in the court below in the event that the case should be remanded.

The more serious mistake made by Judge Trumbull is in regard to the alleged fraudulent alteration of the cross-bill. The bill in this case is full of charges of collusion and fraud, and Judge Trumbull states them as if they had been proven. There was not the slightest effort to prove any such allegations. They are libelous, and without any reasonable foundation whatever.

A motion was made before the Supreme court sitting at Springfield in January, 1873, to vacate the order of that court entered at a preceding term reversing the original decree and remanding the cause. A copy of the record showing the entry of such a motion, and its denial by that court was introduced in evidence before the master. (Rec., 394, 395.)

The grounds of the motion are stated in that portion of the record containing the making of the motion and it is there stated that the mover refers to, and makes a part of his motion, a copy of the original cross-bill, and the affidavit of Wm. H. Wherland attached thereto, and the other affidavit filed and exhibits thereto. But these affidavits and this copy of the cross-bill were not offered in evidence. Judge Trumbull on page 13, of his argument copies an affidavit of Wherland as a part of Exhibit G, referring to page 394 of the record. That affidavit is not a part of Exhibit G, and is not to be found on that page of the record. The original transcript and printed record shows as Exhibit D, an argument of Isham and Crawford made in support of that motion and at the end of that argument is printed the affidavit of Wherland. (Rec., 379, 391). This argument was not Exhibit D, and that exhibit has since been reprinted by

the appellant's counsel as an additional record; and a stipulation is filed that the argument together with the affidavit attached thereto, printed in the original record is there by mistake, and is not to be considered as any part of the record now before this court.

In view of the gravity of these charges and the manner in which they are being treated by counsel, I think it proper to state that counter-affidavits of Simon B. Buckner, Corydon Beckwith, Benjamin G. Ayer, Francis H. Kales, George Chandler and W. C. Goudy were filed in opposition to such motion before the Supreme court, which effectually answered all charges of collusion or fraud and contradicted the affidavit of Wherland. I would be quite content to let the affidavit of Wherland stand as a part of this record if these affidavits could also be introduced for consideration. It does appear by the record that the motion was denied, and that is all that is material in support of the allegations of the plea.

STIPULATION AS TO AMENDMENT OF THE RECORD.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1889.

Henry W. Kingsbury, *Appellant*, *vs.* Simon B. Buckner, *et al.*, *Appellees.* — 176. *Appeal from the Circuit court of the United States for the Northern District of Illinois.*

It is stipulated and agreed that the brief of Edward S. Isham and Henry Crawford, together with an affidavit of William H. Wherland following the same, appearing in the printed record at pages 379–391, were inserted by the clerk of the court below by mistake, and that they form no part of the transcript of the record in this court, and that he omitted the brief of Henry Crawford which should have been inserted as Exhibit D in place of the brief and affidavit above mentioned, which said Exhibit D has been printed as an additional transcript of the record, and is to be substituted for the aforesaid documents sent up by mistake.

It is further stipulated and agreed, that there is a mistake in the printed record on page 375 where the words "in vacation after September term, A. D. 1873," at the top of the page should have read: in vacation after the September term, A. D. 1872, and ought to be followed by the words, May 24th, 1873; this correction being made to correspond with the original document on file in the court below.

JOHN P. WILSON,
LYMAN TRUMBULL,
Solicitors for Appellant.
W. C. GOUDY,
for Appellees.

CHICAGO, December 13, 1889.

Points and Authorities.

I.

A BILL TO SET ASIDE A JUDGMENT OF A COURT OF LAST RESORT FOR ERRORS APPARENT ON THE FACE OF THE RECORD CANNOT BE MAINTAINED IN A LOWER COURT, AND WHERE IT IS ALSO BECAUSE OF NEWLY DISCOVERED EVIDENCE, THE LEAVE OF THE COURT RENDERING THE JUDGMENT MUST FIRST BE OBTAINED.

Southard v. *Russell*, 16 How., 570.
Ricker v. *Powell*, 100 U. S., 105.
Lube Eq. Pl., by Wheeler, p. 177.
Story Eq. Pl., 9th Ed., § 403.
Dennison v. *Goehring*, 6 Pa., 402.
Haskel v. *Raoul*, 1 McCord Ch., 29.
Brewer v. *Bowman*, 3 J. J. Marsh. (Ky.), 492.
Price v. *Carey*, 4 Ga., 570.
Watkins v. *Lawton*, 69 Ga. 672.
Blight v. *McIlvoy*, 4 Mon. (Ky.), 146.
McCall v. *McCurdy*, 69 Ala., 71.
2 Barb. Ch. Pr., 92.
Mitf. Pl., 88.
Coop. Pl., 91.
Strader v. *Byrd*, 7 Ham., 184.
McCall v. *Graham*, 1 Hen. & Munf. Va., 13.
Ryerson v. *Eldred*, 18 Mich., 490.
Roberts v. *Cooper*, 20 How., 480.
Washington Bridge Co. v. *Stewart*, 3 How., 413.

II.

THERE ARE NO ERRORS ON THE FACE OF THE RECORD WHICH WOULD JUSTIFY REVERSAL.

III.

THE CIRCUIT COURT HAD JURISDICTION OF THE SUBJECT-MATTER OF THE CROSS-BILL.

Story's Eq. Pl., §§ 389, 392.
2 Dan. Ch. Pr., 1,548.
Underhill v. *Van Cortlandt*, 2 J. Ch., 339.
Nelson v. *Dunn*, 15 Ala., 501.
Hurd v. *Case*, 32 Ill., 49.
Jones v. *Smith*, 14 Ill., 229.
Lloyd v. *Kirkwood*, 112 Ill., 330.

IV.

THE CIRCUIT COURT HAD JURISDICTION OF THE PERSON OF THE INFANT, AND NO PROCESS WAS NECESSARY TO BRING HIM INTO COURT.

Rev. Stat. Ill., Ch. 21, Secs. 24–30.
Fleece v. *Russell*, 13 Ill., 32.
Reed v. *Kemp*, 16 Ill., 448.
Story Eq. Pl., Sec. 404.
Watkins v. *Lawton*, 69 Ga., 570.

V.

THE SUPREME COURT HAD JURISDICTION OF THE FIRST APPEAL, AND THE INFANT WAS BOUND BY THE CONDUCT OF HIS SOLICITOR IN THE CASE.

Tillotson v. *Hargrave*, 3 Mad., 494.

Levy v. *Levy*, *ibid.*, 245.
Wall v. *Bushby*, 1 Bro. C. C., 484.
1 Dan. Ch. Pr., 74.
Ralston v. *Lahee*, 8 Clark (Iowa), 27.
Dow v. *Jewell*, 21 N. H., 486.
Mills v. *Dennis*, 3 J. Ch., 368.
People v. *Supervisors*, 40 Ill., 125.
Owens v. *McKethe*, 5 Gil., 79.

VI.

IT IS NOT COMPETENT FOR THE COURT IN THIS SUIT TO CONSIDER ERRORS AS TO THE DETERMINATION OF FACTS, BUT ONLY ERRORS OF LAW.

Griggs v. *Gear*, 3 Gil., 10.
Willamette Bridge Co. v. *Hatch*, 125 U. S., 7.
Whiting v. *Bank*, 13 Pet., 6.
Kennedy v. *Bank*, 8 How., 610.
Putman v. *Day*, 22 Wall., 65, 66.
Buffington v. *Harvey*, 95 U. S., 99.
Thompson v. *Maxwell*, 95 U. S., 397.
Beard v. *Burts*, 95 U. S., 391.
Shelton v. *Van Kleeck*, 106 U. S., 534.
Nickle v. *Stewart*, 111 U. S., 776.

VII.

OBJECTIONS TO DEPOSITIONS WHICH GO TO THEIR FORM, AND OBJECTIONS TO THE INCOMPETENCY OF WITNESSES MUST BE MADE BEFORE TRIAL, AND CANNOT BE ALLOWED ON THE HEARING.

1 Green Ev., § 421.
Moshier v. *Knox College*, 32 Ill., 162.
Kimball v. *Cook*, 1 Gilm., 424.
Frink v. *McCreery*, 4 Gilm., 424.
Corgan v. *Anderson*, 30 Ill., 95.
Lockwood v. *Mills*, 39 Ill., 602.
Phy v. *Clark*, 35 Ill., 377.
Swift v. *Castle*, 23 Ill., 214.

VIII.

NONE OF THE ALLEGED ERRORS ARE AVAILABLE TO THE APPELLANT BECAUSE HE WAS A MINOR. AN INFANT IS AS MUCH BOUND BY A DECREE AS AN ADULT.

Chambers, Ch. Jur. of Infants, 772, 795, 7,799.
Enos v. *Copps* 15 Ill., 278.
Wadhams v. *Gay*, 73 Ill., 424.
Hess v. *Voss*, 52 Ill., 472.
Lloyd v. *Kirkwood*, 112 Ill., 337.
McPherson on Infancy, 386.
Herman on Res. Adj., 179.
Freeman on Judgts., § § 151, 513.
Wall v. *Bushby* 1 Brown's Ch. Cas. 484.
Tillotson v. *Hargrave*, 3 Maddox Ch., 494.
Levy v. *Levy*, 3 Mad., 131.
Gregory v. *Molesworth*, 3 Atk., 626.
Morrison v. *Morrison*, 4 Mylne etc., 225.
Ralston v. *Lahee*, 8 Clark, (Iowa), 27.
Joyce v. *McAvoy*, 31 Cal., 273.

IX.

INFANT COMPLAINANTS ARE ALWAYS BOUND BY A DECREE THE SAME AS ADULTS.

Brook v. *Hereford*, 2 P. Wms., 519.
Hanna v. *Spott's Heirs*, 5 B. Mon., 362.
Williamson's Heirs v. *John's Heirs*, 4 Mon., (Ky.) 256.
Jameson v. *Mosely*, 4 Mon., (Ky.) 414.
McClay v. *Morris*, 4 Gil., (Ill.) 383.
Brown v. *Armistead*, 6 Rand (Va.) 594.

X.

THE COLLUSION, FRAUD AND LACHES ALLEGED IN THE BILL WAS NOT PROVED.

XI.

THE STATEMENT IN THE DECREE APPEALED FROM THAT NO REPLICATION HAD BEEN FILED TO THE ANSWER DOES NOT JUSTIFY THE REVERSAL.

XII.

THE DEMURRERS OF JUDGE BECKWITH AND MRS. KINGSBURY WERE PROPERLY SUSTAINED.

XIII.

THE DECREE DISMISSING THE BILL MUST BE AFFIRMED, BECAUSE THE PARTIES WERE NOT BEFORE THE COURT TO ENABLE IT TO GRANT ANY RELIEF TO THE COMPLAINANT.

ARGUMENT.

For the last two decades I have maintained the controversy on the side of my clients in this matter single-handed against large odds as to numbers. During that time I have encountered four next friends, three guardians *ad litem*, five regular guardians and five different sets of lawyers. With every change "the old straw has been threshed over again." The questions have become stale with me, and I may not be able to do my client justice at the present time.

There is not a single element, according to the ordinary principles of common honesty, or natural justice, or conscience, or equity in favor of the claim asserted by Henry W. Kingsbury, who seeks to hold a large and valuable property which never belonged to him or his father. He sets up the statute of frauds to accomplish a fraud. Represented as he has been by his mother, and her husbands, by his next friends and guardians, sanctioned by the court, and by his legal guardians appointed by the court having jurisdiction of such matters, every question has been presented which could be invented to enable him to accomplish the fraudulent purpose of obtaining property to which he has no claim. While an infant, incapable of exercising judgment for himself, he was not to be charged at the bar of conscience with any of these designs; but, since he has reached the age of independent judgment he has followed in the footsteps of his friends.

It is admitted that this property was inherited by Mary K. Buckner and Henry W. Kingsbury, the elder, from

their father, Major Kingsbury, who died in 1856, so that each owned an undivided one-half. Mrs. Buckner continued the owner of her share, unless she was divested by the deed of May 15, 1861. It is admitted that the deed was made without any consideration, although the property was substantially all that she owned, and that it was of the value of many hundred thousands of dollars. The deed does express a legal, but not a valuable, consideration. It was made upon the consideration of one dollar and natural love and affection, and so was a voluntary deed. There was no reason why Mrs. Buckner should give up all of her inheritance to her brother, who owned as much property as she did. For the want of a better reason for claiming the ownership of this property, the son of the brother sets up that the deed was made in contemplation of the husband of Mrs. Buckner going into the confederate army. There is no law under which this property could have been forfeited to the United States as a penalty for the alleged treason of General Buckner. If there was, there is no justice in allowing a private party to claim the property as a penalty for his disloyal act. The evidence in the original case shows conclusively that the deed was not made in contemplation of such an act; that no such intention existed at that time; that General Buckner intended to divest himself of all his interest in his wife's property; and the Supreme court of Illinois, in deciding the case, accepted his disclaimer and directed a conveyance to be made to Mrs. Buckner free from all claim by him by reason of his being a husband and father. The position of the appellant is, that he is entitled to his aunt's property because her husband was guilty of an act disloyal to the government. There is no statute, nor any law, nor any decision, anywhere, in any country, that would sustain such a position.

These, however, were questions for the consideration of the court in the original case, and they do not now properly arise. This case must be decided upon other principles. I have referred to these matters for the purpose of calling attention to the fraudulent and unjust character of the appellant's claims. He was a complainant in the bill now before the court, and the rule which requires a complainant to come into a court of equity with clean hands and a just claim applies to him quite as much as it applied to the complainant in the original suit. Whatever force there may be in that principle it applies to him now, and was of itself a sufficient reason for dismissing the bill in the court below.

I.

A BILL TO SET ASIDE A JUDGMENT OF A COURT OF LAST RESORT FOR ERRORS APPARENT ON THE FACE OF THE RECORD CANNOT BE MAINTAINED IN A LOWER COURT, AND WHERE IT IS ALSO BECAUSE OF NEWLY DISCOVERED EVIDENCE, THE LEAVE OF THE COURT RENDERING THE JUDGMENT MUST FIRST BE OBTAINED.

By the judicial system established in this country there is a court of last resort where litigation must end. Litigation cannot travel around a circle by going from the inferior to the superior court and back from the superior to the inferior, and again from the lower to the higher court. The decision of an appellate tribunal, by whatever name it may be called, must necessarily be final and conclusive and no other litigation can be had except by the consent of that court.

Under our system of laws provision is made for the

correction of errors committed by the lower courts. An appeal or writ of error may be prosecuted to an Appellate or Supreme court, where questions as to errors of law may always be reviewed, and in many cases also questions of fact. A party is also able to have a correction of errors by filing a bill of review in the court where judgment was rendered. In such a case that court will have the power to correct its own mistakes. These may be errors apparent on the face of the record, or the grounds may be outside of the questions actually presented and decided, as in case where the judgment has been obtained by fraud and misrepresentation, or, that evidence material to the controversy shall be newly discovered. The method of a bill of review is perhaps older than those by appeal or writ of error. To a large extent, in this country, the latter has superseded the former; still, the right remains in a proper case to appeal to the court in which the judgment is rendered to correct its own mistakes. One of these methods is equivalent to the other. A party to a suit cannot take an appeal or writ of error, and at the same time prosecute a bill of review. The object in each case is the same, so far as errors are apparent on the face of the record.

There has been some conflict in the decisions of the courts as to whether a bill of review will lie for the vacation of a judgment of a court of last resort upon the ground of newly discovered evidence, or for fraud; but there has been none where the object was to correct errors appearing on the face of the record. A rule which would permit an appeal to a court of last resort, where the decisions of the court below should be called in question and sustained, and would permit, afterwards, the court from which the appeal was taken, to sit in judgment on

the decision of the Appellate court, and overrule the decisions of that court, would be an absurdity, not to be tolerated anywhere. That would be the elevation of the lower court over the higher court, and there could be no end of litigation. The rule has been invariable that a bill of review cannot be sustained for errors alleged on the face of the record, after the judgment had been affirmed by a court of appeals. The rule best supported on principle and by authority as to the vacation of a judgment, after it has been affirmed by a court of appeals, upon the ground of newly discovered evidence is, that such a bill cannot be filed or prosecuted without the consent of the court of appeals.

The law upon this matter has been properly declared by this court in *Southard* v. *Russell*, 16 How., 570, where the court say:

"There is another question involved in this case, not noticed on the argument, but which we deem it proper not to overlook.

"As already stated, the decree sought to be set aside by this bill of review in the court below, was entered in pursuance of the mandate of this court, on an appeal in the original suit. It is therefore the decree of this court, and not that primarily entered by the court below, that is sought to be interfered with.

"The better opinion is, that a bill of review will not lie at all for errors of law alleged on the face of the decree, after the judgment of the appellate court. These may be corrected by a direct application to that court, which would amend, as matter of course, any error of the kind that might have occurred in entering the decree.

"Nor will a bill of review lie in the case of newly discovered evidence after the publication, or decree below,

where a decision has taken place on an appeal, unless the right is reserved in the decree of the Appellate court, or permission be given on an application to that court directly for the purpose. This appears to be the practice of the Court of Chancery and House of Lords, in England, and we think it founded in principles essential to the proper administration of the law, and to a reasonable termination of litigation between parties in chancery suits. 1 Vern., 416; 2 Paige, 45; 1 McCords Ch., 22, 29, 30; 3 J. J. Marsh, 492; 1 Hen. & Munf., 13; Mitford's Pl., 88; Cooper's Pl., 92; Story's Eq. Pl., § 408."

"Neither of these prerequisites to the filing of the bill before us have been observed.

"We think the decree of the court below, dismissing the bill of review, was right and ought to be affirmed."

In *Ricker* v. *Powell*, 100 U. S., 105, this court held, that a bill of review, on the ground of newly discovered matter can only be filed on special leave, which depends on the sound discretion of the court to which the application is made, and it was further decided that where the bill contained averments of errors of law as well as newly discovered matter, that the bill could not be prosecuted even as to the errors on the face of the record without leave.

Other authorities will be cited, but without going further it is clear that the appellant in this case is concluded in so far as he raises questions as to errors of law on the face of the record. The principal decree, which settled the rights of the parties, and declared the deed of May 15, 1861, to be a deed of trust for the use of Mrs. Buckner, was entered November 13, 1871, in pursuance of the mandate and special direction of the Supreme court

of Illinois, and thereby it became the decree of that court. All of the errors alleged by the bill in the present case, if any existed, were in the record prior to the decision by the Supreme court, and to the entering of that decree, and so it becomes a bar to any further proceedings in the Circuit court.

On the second appeal to the same court these particular matters were alleged to be errors, and the result was an affirmance of the decree of November 13, 1871, and of the subsequent decrees except the last, of August 2, 1872, which related only to a small part of the lands in controversy, and that has been awarded to Henry W. Kingsbury in pursuance of the direction of the Supreme court, by a decree of March 7, 1877. (Rec., 393.)

There is no claim of newly discovered evidence in the bill filed in the present case. There is a claim, however, of collusion and fraud. No leave was given by the Supreme court for the filing of this bill. If the rule of law requires consent of the appellate court where the judgment is rendered in order, to enable a party to file a bill to set aside the judgment on the ground of fraud, then this bill could not be maintained, but it is unnecessary to enter into a discussion as to what the law is on this point, because no proof was offered to sustain these statements of the bill. *Unproven allegations cannot sustain the jurisdiction of the court.* This case stands precisely as if it had been filed to correct errors on the face of the record alone. Judge Trumbull has cited *Pac. R. R. of Mo.* v. *Pac. Ry.*, 111 U. S., 506, as an authority to sustain this bill. That may be a justification for filing a bill to set aside a judgment of the Supreme court in a lower court where the ground is fraud alone, but it is not applicable to the case of a bill for errors apparent on the face of the

record. It appears in that case that a bill was filed to foreclose a mortgage in which a decree was rendered; on appeal to this court the decree was affirmed; then a bill was filed in the lower court alleging fraud and collusion in the entry of the decree which had been thus affirmed.

A demurrer was interposed to the bill and sustained. On appeal to this court the judgment was reversed and the cause remanded. The principle as to whether such a suit could be maintained to set aside the judgment of the Supreme court is not referred to in the opinion, and no points made by counsel are furnished in the report. The question as to whether such a bill could be prosecuted without the leave of this court was not raised or decided, but the court quoted from the opinion, in the case as reported in the 101 U. S., 296, an extract which might be considered as equivalent to leave to prosecute in the court below a bill to set aside the judgment. As before stated, it is not necessary to go into a discussion of this point, because the elements of collusion and fraud are practically eliminated from the case now to be considered by this court.

A bill of review is analogous to a writ of error at common law; the object of it is to correct, alter or reverse a decree.

Lube, Eq. Pl. by Wheeler, p. 177.
Story Eq. Pldg., 9th Ed., § 403.

In *Dennison* v. *Goehring*, 6 Pa., 402,

where it was held that a bill of review would not lie after affirmance of the original decree on appeal, said, page 403:

"A bill of review is in the nature of a writ of error, and its object is the examination and reversal of a decree made on a former bill signed and enrolled."

In *Haskel* v. *Raoul*, 1 McCord's Ch., 29,

The court say:

"An appeal in England being attended with an expense which few can bear, a rehearing or review may be necessary. But here the court of appeals is accessible to all, and in the exercise of its legitimate powers can and does answer all the beneficial purposes which can arise from bills of review for error in the decree."

In *Brewer* v. *Bowman*, 3 J. J. Marsh, Ky.,

The court said:

"There are two cases for which bills of review may be prosecuted:

"1. Errors apparent upon the face of the record.

"2. Matters *dehors* the record.

"Bills of review of the first class cure errors in a maanner analogous and equivalent to the remedy, by writ of error."

In *Price* v. *Carey*, 4 Ga., 570,

The court say:

"A bill of review is in the nature of a writ of error, and its object is to procure an examination and alteration or reversal of a decree made upon a former bill, which decree has been signed and enrolled."

In *Watkins* v. *Lawton*, 69 Ga., 672, a bill was filed to vacate a decree which had been affirmed by the Supreme court, and it was held the bill could not lie to reverse such a judgment or decree for error apparent on the face thereof.

That case is an authority also upon the question of jurisdiction of person and subject-matter by a cross-bill where the defendant was an infant, directly applicable to

the other points raised in this case. Indeed it may be said to be on all fours with the case at bar.

In *Blight* v. *McIlvoy*, 4 Mon., Ky., 146,

The court said:

"But so far as this bill of review seeks to change the last decree, and show reasons why the last should not have carried the former into effect remains to be considered. To this a positive bar is presented to relief by the remedy attempted. No question on this point can be made or presented, but what might have been made before this court on the writ of error, when the last decree was had on the first writ of error, and that decree is already affirmed. If the present plaintiffs in error then failed to make the questions and points which they might have done, they are barred from making them afterward either in this court, or by bill of review on the face of the former decree in the court below, which is an analogous and equivalent remedy."

In *McCall* v. *McCurdy*, 69 Ala., 71,

The court say:

"There is much of difficulty in defining the errors of law apparent on the face of the decree, which will support a bill of review. The bill partakes of the nature of a writ of error, or of an appeal, in our system, the substitute for a writ of error. Though of the nature of a writ of error which is said to have led to its introduction into the practice and procedure of courts of equity, and though each is a remedy for the reversion and correction of errors in final decrees, it cannot be said they are concnrrent and co-extensive remedies. *Green* v. *Jenkins*, 1 De. G., F. & J., 454. The errors upon which a bill of review may be founded would be open to examination and

correction on a writ of error. There are, however, errors which will support the writ, not available as a basis for the bill. On a writ of error, the whole record is drawn under the consideration of the court, and advantage may be taken of all errors and irregularities which may have intervened in the course of the proceedings, if they have not been waived, as well as errors apparent. The error of the decree in any respect, whether it be of law or fact, is open to inquiry and to correction. The errors which will support a bill of review are errors of law *apparent* on the face of the decree. There must be error in substance, of prejudice to the party complaining, apparent on the face of the pleadings, proceedings or decree."

After a decree has been affirmed in the court of last resort, no bill of review is allowed.

2 Barb. Ch. Pr., 92.
Mitf., Pl., 88.
Coop. Pl. 91.

And when the original decree has been affirmed on a bill of review, no subsequent bill of review can be allowed.

Strader v. *Byrd*, 7 Ham., 184.

Brewer v. *Bowman*, 3 J. J. Marshall, (Ky.) 492.
Held:

Bill of review for error apparent on the face of the record cures errors in manner analogous and equivalent to writ of error.

Therefore affirmance upon writ of error bars bill of review for any error which existed in record, but which was not assigned nor inquired into by this court.

So reversal upon writ of error or appeal, with directions

how to render decree, and a decree rendered conformably by inferior court, bars bill of review to inquire into errors which were in record but not noticed by this court.

McCall v. *Graham*, 1 Hen. & Munf., (Va.) 13.

"The defendants obtained a decree in the County court of Richmond against the complainant upon a second verdict found on the common law side of that court in a suit in chancery brought under the peculiar circumstances of the case to recover the mense profits of an estate to which they were entitled, and which had been in the possession of the grandfather of the present complainant for many years. The decree was for the sum of £818, 9s., 5d. An appeal was taken to this court and the decree affirmed. Upon an appeal to the court of Appeals the decree of this court was affirmed, which decree of affirmance was entered in this court.

"The complainant at March term last, obtained leave of the court to file her bill of review, in which she states among other things, (1) the errors which she supposes appear upon the face of the proceedings; (2) that the depositions read at law, upon the trial of the issue, were not with her consent or that of her counsel; and (3) that the evidence now produced has come to her knowledge since the trial at law of the issue in the County court, and of which she was not then informed, which reasons, she alleged, were sufficient for this court to reverse the former decree. The court, upon receiving the bill of review, awarded a supersedeas, and now a motion *was* made for its discharge "*by the court.*" So much of the bill of review as seeks a reversal of the decree, for the errors complained of in the proceedings which have been before the court of Appeals, this court must reject, because it has no power to revise the decisions of that court;

neither ought it to have any such power, for it would lead to endless litigation. If there was any doubt about it, the case of *White* v. *Atkinson*, 2 Call., 378, would be clear authority against it; but it is one of those cases which admit of no doubt, and if, when the bill was offered, it had been sent to a master with orders to strike out all impertinent matter, the little that would have remained would clearly have shown that it ought not to have been received."

Ryerson v. *Eldred*, 18 Mich., 490.

In this case the court held that no bill of review lay upon a decree of the Supreme court, saying:

"We can pay no attention to the proceeding in the Circuit court allowing a bill of review. The decree complained of is a decree made by this court sitting as a court of last resort, and if any such bill can be permitted at all it can only be done by the leave of this court."

By reference to the record and statement preceding this argument, it will be seen that on the second appeal counsel for the present appellant raised every question wherein error is now alleged, and the Supreme court of the state having overruled them, that decision is final and conclusive; no bill of review upon this ground can be maintained.

Among the errors alleged, it is claimed that the Circuit court had no jurisdiction of the person of the infant or the subject-matter set up in the cross-bill, and that the Supreme court sitting at Springfield had no jurisdiction of the appeal, and, hence, that the judgment of that court and the decree rendered in pursuance of its directions are mere nullities, and do not prevent the same questions from being presented upon a bill of review.

In *Roberts* v. *Cooper*, 20 Howard, 480, this court says:

"On a writ of error to this court the judgment of the court below was reversed, and the record remitted for further proceedings, in pursuance of the judgment of this court. The report of the case in 18 Howard, 173, exhibits a full statement of the facts, and of the questions of law arising thereon, as decided by the court, which it is unnecessary to recapitulate. On the last trial, the Circuit court was requested to give instructions to the jury, contrary to the principles established by this court on the first trial, and nearly all the exceptions now urged against the charge are founded on such refusal. But we cannot be compelled on a second writ of error in the same case to review our own decision on the first. It has been settled by the decisions of this court that, after a case has been brought here and decided, and a mandate issued to the court below, if a second writ of error is sued out, it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be reheard or examined upon the second. To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first, would lead to endless litigation. In chancery a bill of review is sometimes allowed on petition to the court; but there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate of chances from changes in its members. See *Sizer* v. *Many*, 16 How., 173; *Corning* v. *Troy Iron Company*, 15 How., 466; *Himely* v. *Rose*, 5 Cranch., 515; *Canter* v. *The Ocean Insurance Company*, 1 Pet., 511; The Santa Maria, 10 Wheaton, 431; *Martin* v. *Hunter*, 1 Wheaton, 355; and *Sibbald et, al.* v. *United States*, 12 Pet., 488."

In *Washington Bridge Co.* v. *Stewart*, 3 Howard, 413, the court delivers the following opinion:

"This cause is now before us upon an appeal from a decree from the Circuit court, made by it upon an auditor's report, in conformity with the mandate issued by this court, when the cause was before it upon a former occasion.

"The appellants did not except to the auditor's report in the court below.

"When the cause was tried upon the first appeal, the decree of the Circuit court was affirmed by a divided court.

"We are now asked by the counsel for appellants to permit him to re-examine the decree of the Circuit court upon its merits, affirmed as it was by the Supreme court, *upon the ground that the affirmance was made when this court had not jurisdiction of the case*; the first appeal having been taken upon what has since been discovered to have been an interlocutory, and not a final decree.

"The Supreme court certainly has only appellate jurisdiction, where the judgment or decree of the inferior court is final. *But it does not follow, when it renders a decree upon an interlocutory and not a final decree, that it can, or ought, on an appeal from a decree in the same cause, which is final, examine into its jurisdiction upon the former occasion.*

"the cause is not brought here in such a case for any such purpose. It was an exception, of which advantage might have been taken by motion on the first appeal. The appeal would then have been dismissed for the want of jurisdiction, and the cause would have been sent back to the Circuit court for further proceedings. But the exception not having been then made of the alleged want

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of jurisdiction, the cause was argued upon its merits, and the decree appealed from was affirmed by this court. Its having been affirmed by a divided court, can make no difference as to the conclusiveness of the affirmance upon the rights of the parties.

"It is settled, that when this court is equally divided upon a writ of error or appeal, the judgment of the court below stands affirmed. *Etting* v. *Bank of the United States*, 11 Wheat., 59; the case of *The Antelope* 10 Wheat., 66. Having passed upon the merits of the decree, this court has now nothing before it but the proceedings subsequent to its mandate. So this court said in Himley and Rose, and in the case of the Sant Maria, 5 Cranch., 314; 10 Wheat., 431. Its decree became a matter of record in the highest court in which the cause could be finally tried. *To permit afterwards, upon an appeal from proceedings upon its mandate, a suggestion of the want of jurisdiction in this court, upon the first appeal, as a sufficient cause for re-examining the judgment then given, would certainly be a novelty in the practice of a court of equity.* The want of jurisdiction is a matter of abatement, and that is not capable of being shown for error to endorse a decree upon a bill of review. Shall the appellant be allowed to do more now than would be permitted on a bill of review, if this court had the power to grant him such a remedy?

"If he was, we should then have a mode for the review of the decrees of this court, which have become matters of record, which could not be allowed as an assignment of error for a bill of review, in any of those courts of the United States in which that proceeding is the ordinary and appropriate remedy.

"The application has been treated in this way, to show

how much at variance it is with the established practice of courts of equity. It might, however, have been dismissed, upon the authority of a case in this court, directly in point. *Skillern's Executors* v. *May's Executors*, 6 Cranch., 267, and upon the footing that there is no mode pointed out by law in which an erroneous judgment by this court can be reviewed in this or any other court. In Skillern's case, the question certified by the court below to this court for its decision, was, *whether the cause should be dismissed from the Circuit court for want of jurisdiction*, after the cause had been removed to the Supreme court, and this court had acted upon and remanded the cause to the Circuit court for further proceedings. This court said: 'It appearing that the merits of the cause had been finally decided in this court, and that its mandate required only the execution of its decree, it is the opinion of this court that the Circuit court is bound to carry that decree into execution, *although the jurisdiction of that court is not alleged in the pleadings*.' The jurisdiction of this court, in that case, was as defective as it is said to have been in this. When that case was before this court, though the judgment of the court below on it would have been reversed, upon motion, for the want of jurisdiction on the face of the record, the defect having escaped the notice of the court and of counsel, and the court having acted upon its merits, it determined that its decree should be executed. The reason for its judgment, no doubt was, that the motion to dismiss the case in the court below for the want of jurisdiction, after it had been before the Supreme court by writ of error, and had been acted upon, would have been equivalent, had it been allowed, to a decision that the judgment of this court might be reviewed, when the law points out no mode in which that can be done, either by this or any other court.

"The want of power in this court to review its judgments or decrees, has been so frequently determined by it, that it is not now an open question. Such is the result of what the court said in Himely and Rose, 5 Cranch., 314. The court says in *Martin* v. *Hunter's Lessee*, 1 Wheat., 304, in reply to the allegation that its judgment had been rendered when it had not jurisdiction: 'To this argument several answers may be given. In the first place, it is not admitted that upon this writ of error the former record is before us. In the next place, in ordinary cases, a second writ of error has never been supposed to draw in question the propriety of the first judgment, and it is difficult to perceive how such a proceeding could be sustained on principle. A final judgment of this court is supposed to be conclusive upon the rights it decides, and no statute has provided any process by which this court can reverse its judgments. In several cases formerly adjudged in this court, the same point was argued, and expressly overruled. It was solemnly held that a final judgment of this court was conclusive upon the parties, and could not be re-examined.' In *Browder* v. *McArthur*, 7 Wheat., 58, counsel applied for a re-hearing; the court refused it, saying a subsequent appeal brought up only the proceedings subsequent to the mandate, and did not authorize an inquiry into the merits of the original decree. The same is said with equal positiveness in the case of The Santa Maria, 10 Wheat., 442. To these cases we add an extract from the opinion of the court, given by the late Mr. Justice Baldwin, in *ex parte* Sibbald, 12 Pet., 442. That case called for the most careful consideration of the court. "Before we proceed to consider the matter presented by these petitions, we think it proper to state our settled

opinion of the course which is prescribed by the law for this court to take, after its final action upon a case, brought within its appellate jurisdiction, as well as that which the court whose final decree or judgment has been thus verified, ought to take. Appellate power is exercised over the proceedings of inferior courts, not on those of the appellate court.

"The Supreme court has no power to review its decisions, whether in a case at law or in equity. A final decree in chancery is as conclusive as a judgment at law. 1 Wheat., 355; 6 Wheat., 113, 116. Both are conclusive of the rights of the parties thereby adjudicated." These cases are decisive of the motion made in this case.

It is settled by the decisions of this court in the cases cited that a bill of review for errors appearing on the face of the record, where the decree or judgment has been rendered by a court of last resort, will not be entertained, *even where there was a want of jurisdiction*, when the question was not raised in the Supreme court. *A fortiori*, as to all other errors.

II.

THERE ARE NO ERRORS ON THE FACE OF THIS RECORD WHICH WOULD JUSTIFY A REVERSAL.

Even if the appellant was not concluded by the decision of the Supreme court of the state as to alleged errors, it is clear that none existed which would have justified a reversal. I will take up in their order, the various points raised for the purpose of showing that the proceedings were regular, or, if irregular, that no error was made injurious to the appellant, which would produce a reversal of the decree.

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The point which would strike one as being the most serious on a statement of it is the alleged want of jurisdiction of the Circuit and Supreme courts, and it is claimed that there was no jurisdiction, because the matter of the cross-bill was not germane to the original bill, and so there was a want of jurisdiction of the subject-matter, and that no process was issued upon the cross-bill against the infant defendant, and so there was a want of jurisdiction of his person. Neither of these positions can be maintained.

1. *The Circuit court had jurisdiction of the subject-matter of the cross-bill, and of the person of the infant defendant.*

a. The cross-bill sought relief touching the same subject-matter as the original bill.

The question of jurisdiction is to be determined by an inspection of the pleadings. It is claimed that the subject-matter of the cross-bill was foreign to that of the original bill; that the questions presented by the cross-bill were not germane to those involved in the original bill. What is the subject-matter presented by the original bill for determination? We answer that it was the title to the whole of the real estate formerly owned by Julius J. B. Kingsbury. It was alleged that complainant was sole owner of the land in fee simple, subject to certain incumbrances, that he acquired title to it by inheritance from his father, who obtained the title to one-half by inheritance from his father, and the other by a deed from his sister, joined by her husband, and that there was a cloud thereon by reason of a will recorded in the County court of Cook county. The prayer was that the will be set aside, the complainant be decreed the sole owner of all the real estate, and a perpetual injunction be granted restraining

Mrs. Buckner and her husband, as well as other defendants, from claiming title to any of the land or interfering with the rents or profits of the property.

Suppose that an answer had been put in admitting the averments of the bill in regard to the manner by which the complainant acquired title, which would include the deed of May 15, 1861, omitting all statement that it was a deed of trust, and Mrs. Buckner the equitable owner, and making issue only in regard to the will, what decree would have been rendered, upon a finding that there was no valid claim under the will, because of the effect created by the birth of a posthumous child? Clearly, a decree according to the prayer of the original bill, declaring the title to be in the complainant, and enjoining Mrs. Buckner, with the other defendants, from claiming the land or its profits. She would, by such a decree, be forever debarred from asserting that she was the owner in equity of one-half of the property, and entitled to an account of rents from the delivery of the deed of May 15, 1861; she could not be heard to say that such conveyance was a deed of trust.

The statements of the original bill compelled Mrs. Buckner to set up the facts touching the deed of May 15, 1861, in her answer as a defense to the relief asked; the same facts entitled her to the relief sought by the cross-bill. The object of the original bill was to establish and confirm the complainant in the title. It is true that the original bill set forth the supposed claim of the defendants to be under the will, but that in no wise prevented each of them from presenting the true claim to the land. As a matter of fact, John J. D. Kingsbury claimed only under the will, and Gen. Burnside claimed only to be executor of the will, but Mrs. Kingsbury claimed a devise under

the will, and dower independent of it, while Mrs. Buckner claimed by devise under the will, and also under the trust executed by the apparently absolute deed of May 15, 1861. By what rule of equity is a defendant prohibited from litigating alone the claim of the title supposed by the complainant to be the one relied on?

Suppose that an absolute deed is in truth a mortgage, and the mortgagor subsequently obtains a tax title, which is a cloud on the title, and the grantee in the deed (really mortgage) files a bill against the mortgagor, alleging that he is owner by virtue of this very deed, and asking to confirm and establish his title, remove the cloud and enjoin the mortgagor from all interference with the land or its title, will any one pretend that it is improper for the defendant to set up the facts in his answer, file a cross-bill, and ask a decree allowing him to redeem?

The original bill states that Julius J. B. Kingsbury died June 26, 1856, intestate, and seized of the real estate in controversy, and leaving a widow, Jane C. Kingsbury, and two children, Mary K. Buckner, the wife of Simon B. Buckner, and Henry W. Kingsbury, the father of the complainant.

The bill then states: "That on or about the 15th day of May, 1861, the said Simon B. Buckner and Mary K. Buckner, his wife, by their deed of that date, duly executed and acknowled, *granted, bargained, sold and conveyed* to the said Henry W. Kingsbury, the father of your orator, one undivided half of" the property described.

The bill then states that the father of the complainant married, was killed in battle, and that the complainant was born as a posthumous son.

The bill then avers: "That the said Henry W. Kingsbury, father of your orator, died intestate, and seized in fee simple of all the real estate hereinbefore described; and your orator now holds all the said real estate by inheritance from his said father, subject to the dower estates of his said mother, and of the said Jane C. Kingsbury therein; and also subject to certain incumbrances still outstanding against the said property, or some portions thereof."

The bill then proceeds to set forth the proceedings in another case, wherein a receiver had been appointed, who was managing the property, etc.

The bill then states the making of the will, the attempted probate in Virginia, the record thereof in Illinois, and certain reasons why the will and proof were invalid.

The prayer for relief is: "That the said instrument hereinbefore referred to, purporting to be the last will and testament of the said Henry W. Kingsbury, deceased, may be declared invalid and of no legal force and effect as a last will and testament; that the proceedings of the County court of Cook county, hereinbefore referred to, admitting the said instrument to record, and directing that the same be treated as good and available in law, in like manner as wills executed in this state, may be reversed and set aside, or declared to be null and void, as constituting a cloud upon your orator's title to the real estate hereinbefore described; *that your orator's right and title by inheritance to the estate hereinbefore mentioned, as the posthumous son and only heir at law of the said Henry W. Kingsbury, deceased, may be confirmed and established; and* that in the meantime the said Ambrose E. Burnside and certain other of the defendants hereinafter mentioned,

may be enjoined and restrained from interfering or intermeddling with the said estate claimed by your orator, as aforesaid, or with the rents, issues or profits thereof, and from attempting in any way to obstruct or interfere with the said John Woodbridge in the performance of his duties as receiver aforesaid, *and that on the final hearing of this cause the said injunction may be made perpetual;* and that your orator may have such other and further relief in the premises as the nature of his case may require, and to your Honors seem meet."

The persons afterwards mentioned as those against whom an injunction was sought, were: Ambrose E. Burnside, Mary K. Buckner, Simon B. Buckner, and John J. D. Kingsbury.

In answering this bill, the defendants, Mrs. Buckner and her husband, admitted that a deed, dated May 15th, 1861, purporting to convey to Henry W. Kingsbury, deceased, the property described, was signed and acknowledged, *but they expressly deny that they granted, bargained, sold and conveyed the title to said real estate, as alleged in the bill of complaint*, but, on the contrary, the sole purpose was to vest the legal title in him to hold in trust and not to create in him any beneficial interest whatever. The answer waives any interest of Gen. Buckner in the trust or property, for the benefit of his wife, and proceeds to set out the evidence of the trust, so as to take it out of the statute of frauds. It also denies the invalidity of the will, and submits the question, as to the effect of the posthumous birth to the court.

Thus it will be seen that the pleadings in the original suit put in issue the question as to the sole ownership by the complainant as to the land and the conveyance of an

undivided half, as deed of bargain and sale, by Mrs. Buckner and her husband to her brother.

It was clearly necessary that the defendants should accept the issue tendered to prevent the relief asked.

The same facts contained in the answer, were set up in the cross-bill, and they again were answered by the original complainant and the other defendants.

It seems to us to be too clear for argument that the subject-matter of the litigation, in the original suit, was the land and the title to it, and not merely the questions in regard to the will.

A cross-bill is a bill filed by a defendant touching the matters in question in the original bill.

Story's Eq. Pl., § § 389, 392.
2 Dan. Ch. Pr., 1,548.

A cross-bill may set up additional facts not alleged in the original bill, relative to the same subject-matter.

Underhill v. *VanCortlandt*, 2 J. Ch., 339, 355.

So, although the allegations of a cross-bill must relate to the subject-matter, it is not restricted to the issues of the original bill.

Nelson v. *Dunn*, 15 Ala., 501.
Hurd v. *Case*, 32 Ill., 49.

In *Jones* v. *Smith*, 14 Ill., 229, the Supreme court expressly decided the point, now made. Smith filed a bill against Jones, alleging that he had become the owner of land by purchase under an execution, and that there was a mistake in the date of the execution, and asking to have it corrected. No denial that there was such a mistake was made, but Jones set up

certain facts in his answer, and also filed a cross-bill containing the same, by which it was alleged that the judgment itself was satisfied and no title passed by the sale, and asking to have the title declared in him and the judgment satisfied. The court below struck the cross-bill from the files, and such action was assigned as error. The court say: "No fitter case could be imagined for a cross-bill than the one which is presented by these pleadings. The complainant, in the original bill, seeks relief by having evidence of his rights perfected, which he claims under a sale upon two executions issued upon judgments at law. Those rights depend not only on the validity of the executions themselves, and the sales under them, but also upon the judgments upon which the executions were issued, or may depend upon them if the purchaser was aware of the alleged circumstances affecting them; so that those judgments, executions, and the sales under them, * * * and all circumstances and facts connected with them, constitute the subject-matter of the original bill. The complainant, in that bill, claims that he has equitable rights beyond what appear on the face of the proceedings which are the basis of his rights; * * * Jones, on the other hand, insists that so far from Smith having any equitable rights in the premises, beyond what were apparent on the face of the proceedings, he himself had latent rights growing out of the same subject-matter, which it is the duty of a court of equity to make manifest in his favor. * * * That Smith had too much evidence of legal rights in the premises, instead of not enough."

In *Lloyd* v. *Kirkwood*, 112 Ill., 330, it was decided that where a plaintiff after having obtained a decree against an infant owner of land establishing a resulting trust as to

two-thirds of the land and investing him with the legal title, filed his bill for a partition of the premises and the infant after answering filed a cross-bill to impeach and set aside the decree, under which the plaintiff derived title, on the ground of error in the proceedings it was held that such cross-bill was properly filed and that it was error to dismiss the same as not being germane to the original bill.

Upon these authorities, as well as others which might be cited, the practice in Illinois clearly allows the filing of a cross-bill where the original bill sought relief in regard to a portion of the land, or as to one chain of title, and that it was proper for a defendant to set up any claim that he might have to other parts of the land, or by virtue of another title. If there had been an omission on the part of Mrs. Buckner to assert that the deed of May 15, 1861, was a deed of trust and that she was the owner of an undivided one-half of the land, and a decree had followed, it would have been a bar against any future suit brought by her to assert her rights. It was absolutely necessary that she should set up whatever claim and title she had to the land which Henry W. Kingsbury claimed by his original to own free from any claim by her.

b. No process was necessary to bring the infant complainant into court.

The revised statutes of Illinois, Chap. 21, Secs. 24 to 30, inclusive, provide for filing a cross-bill and the mode of proceeding upon it. Under these provisions of the statute no process was necessary to bring the parties to the original bill into court, but the cross-bill was regarded as an adjunct or part of the original suit and the whole together as constituting but one case.

Fleece v. *Russell*, 13 Ill., 32.
Reed v. *Kemp*, 16 Ill., 448.

In England a cross-bill was not only an independent suit but might be filed in another court.

Story Eq. Pld., Sec. 404.

Independent of the statute of Illinois the cross-bill would be a new suit, and be treated as a separate proceeding. In such a case process would be necessary, but by the statute a cross-bill is a mere pleading in the original suit and auxillary to it, and both are to be heard together. Henry W. Kingsbury filed the original bill and brought the complainants in the cross-bill into court as defendants. He was therefore already in court and no process was necessary to bring him in. Being in court, the case proceeded as if he had been brought in by the service of process.

After the cross-bill was filed a rule was entered on the defendants to answer it within fifteen days. (Rec., 73.) Subsequently Judge Beckwith was appointed a guardian *ad litem*, and he did file answer. The other defendants, Eva Lawrence, the mother of Henry W. Kingsbury, and her husband, also answered by Beckwith, Ayer & Kales. (Rec., 79.)

The answer of Henry W. Kingsbury, by his guardian *ad litem*, was not a mere form, but one of substance; each of the material statements of the cross-bill was answered specifically. An issue was made as to the character of the deed of May 15, 1861, and the statute of frauds was expressly plead. An issue was also made in regard to the will of Henry W. Kingsbury. (Rec., 74–79.) To this answer a replication was filed. (Rec., 85.)

It is admitted that a court in Illinois could not acquire jurisdiction of the person of an infant by the appointment of a guardian *ad litem*. It has been held in numerous

cases that an infant defendant must be served with process in order to give jurisdiction of his person, and that in the absence of such service the appointment of guardian *ad litem*, is irregular, and does not cure the want of such service. Of this character are:

Campbell v. *Campbell*, 63 Ill., 462,
McDermid v. *Russell*, 41 Ill., 490,
Hickenbotham v. *Blackledge*, 54 Ill., 316,

which cases are cited by Judge Trumbull in his brief.

But there is no case in Illinois which hold that an infant complainant in an original bill must be served with process upon a cross-bill in order to obtain jurisdiction of his person. In the case last cited, where the defendants were infants, and no summons was issued or service had on the minors, and a guardian *ad litem* was appointed for them, who filed an answer, it was held that there was a want of jurisdiction. In that case the minors were not even named as defendants in the bill, and the first appearance of their being parties was the appointment of the guardian *ad litem*. The court say:

"The minors should have been made parties, either plaintiff or defendant, *and* if the *latter*, a summons should have been issued against and served upon them. Unless the bill had made them defendants, the court could not do so by merely appointing a guardian *ad litem*, and his entering their appearance. They should, at least, to become parties, have been named by the bill, and a summons issued against them and served, *if defendants*. Not being parties to the bill, the court had no power to render any decree affecting their interests in this real estate, and in that the decree was erroneous."

It is claimed by Judge Trumbull that the minor had no

notice of the filing of the original suit, or of the cross-suit. It is true that the bill alleges that neither he nor his kin had any knowledge of his proceeding, but there is not the slightest evidence to sustain such an allegation. The original bill was signed by Judge Beckwith as next friend, and he made an affidavit as to the truth of its statements, in which he made oath that he was the next friend of Henry W. Kingsbury, a minor, the complainant in the bill.

In view of the participation of the mother and other friends of the minor in the subsequent proceedings, it is quite idle to make any such pretense.

c. The Supreme Court had jurisdiction of the first appeal, to hear and decide the case.

By section eight of article six of the constitution, it is provided that appeals and writs of error may be taken to the Supreme court, held in the grand division, in which the case is decided, or, by consent of parties, to any other grand division.

The decree was rendered by the Circuit court, and therein it is stated, "And the parties aforesaid in open court agree that such appeals may be prosecuted to, and the record filed in the Central grand division at its next term, and that one record may be used for both appeals."

The record was filed at Springfield, and thereon, Henry W. Kingsbury, by his next friend, assigned errors, and Mary K. Buckner and Simon B. Buckner assigned errors. There was no formal joinder by either party, but the appellants and appellees, the infant by his next friend, guardian *ad litem*, and counsel appeared and argued the errors assigned. The case was taken under advisement, and subsequently, the decree below reversed,

and the cause remanded with specific directions to enter a particular decree.

It is now said that the action of the Supreme court was without jurisdiction, because the infant, by his next friend and guardian *ad litem*, could not legally consent to the hearing of the appeals in the Central division.

The appeals were taken and perfected; by the usual rule, the record would be filed in the Northern grand division; but by consent it was filed in the Central.

The appeal could not have been dismissed even on motion, because it was properly perfected. The only remedy would be by motion in the Supreme court to strike from the docket and to refuse a hearing in the Central division. The jurisdiction of the court over the subject-matter was complete in any division. In case of an appeal no process issues to the appellee, because it is a continuation of the case and the parties go with it, and therefore the court has jurisdiction of the person. Unless, however, consent is given and entered of record in the court below, or the appellee voluntarily appears, the court cannot hear the case in another division from that in which the judgment is rendered. It is not, therefore, a question of jurisdiction, but merely a question as to the place of hearing.

When the consent is given and entered of record, or when the appellee appears to an appeal in another division, he cannot afterwards, even on motion, have the cause striken from the docket.

The infant is in court, so the question is whether the next friend and guardian may consent to a hearing, at a time and place, when and where, the law will not *compel* the hearing. We think no authority can be found, and

none has been cited, going so far as to hold that the proceedings in such case are either irregular or void.

An infant is bound by the conduct of his solicitor in a cause.

Tillotson v. *Hargrave*, 3 Mad., 494.
Levy v. *Levy*, *Ibid.*, 245.
Wall v. *Bushby*, 1 Bro. C. C., 484.
1 *Dan. Ch. Pr.* 74.
Ralston v. *Lahee*, 8 Clark (Iowa), 27.

Although a court will not usually enter a decree by consent, where infants are concerned, without an inquiry whether it was for their benefit, yet, when once a decree has been pronounced without that step, it is considered of the same authority as if such an inquiry had been made and a certificate that it would be for their benefit.

Dan. Ch. Pr., 164.
Dow v. *Jewell*, 21 N. H., 486.
Mills v. *Dennis*, 3 J. Ch., 368.

In this case the consent was given by the parties in open court and entered of record, and it is to be presumed that the court assented to it for the benefit of the infant.

No suggestion of injury or prejudice is made, or can, in the nature of things, be made.

Again, an *appeal was prosecuted by the infant by his next friend, and errors assigned; a record was filed for this appeal. The infant was in court prosecuting his own appeal.* By repeated decisions, in a chancery case the whole case is before the Supreme court without the assignment of cross-errors. But in this case cross-errors were assigned, and the court considered and decided the

whole case on that appeal. The appeal of the complainants in the cross-bill may be disregarded without affecting the result.

It is said that there was no joinder in error. By the well-established practice, a joinder in error is a matter of form, equivalent to a *similiter* in making an issue of fact, and when the appellee appears and argues the errors, he is estopped from making an objection on that ground.

As we propose to present more fully the law and practice, where infants are concerned, in a later part of this argument, we think any further discussion of this point now unnecessary.

By the constitution of the state one Supreme court is created with Appellate jurisdiction. The state is divided into three grand divisions, in each of which a term of court is to be held. Section 8, article 6, provides that: "Appeals and writs of error may be taken to the Supreme court in the grand division in which the case is decided, or, by consent of the parties, to any other grand division."

The court had jurisdiction of the case properly appealed, no matter where the term was held. The state was divided into grand divisions for the convenience of litigants and attorneys. Where parties to an appeal consent to the hearing of the case out of the division in which the case was decided, or appeared and submitted the case, the proceeding was entirely regular. A party could not be compelled to try his appeal out of his own district; but if he consented and submitted his cause there was no want of jurisdiction. The cases cited by Judge Trumbull on this point sustain this view.

In *People* v. *Supervisors*, 40 Ill., 125, it was held that

a writ of *mandamus*, where the Supreme court had original jurisdiction, should be made returnable in the second grand. The effect of the decision was merely to hold that the defendant in such a case could not be compelled to appear out of the grand division in which he resided.

In *Owens* v. *McKethe*, 5 Gill., 79, it was merely held that all cases removed into the Supreme court by appeal or writ of error, went to the court held in the division in which the same was decided, unless the parties, by consent, sent them into the adjoining division.

Goforth v. *Adams*, 11 Ill., 52, is to the same effect.

All of these cases, however, were under the constitution of 1848, and were not under that of 1870.

As already remarked, Henry W. Kingsbury took an appeal himself from the decree dismissing his original bill and filed a transcript in the Supreme court at Springfield and assigned errors thereon. In answer to that appeal Mrs. Buckner and her husband, with the other appellees, appeared and submitted the case. By this act that court acquired authority and jurisdiction to hear and determine the appeal, irrespective of the appeal taken by Mrs. Buckner. The questions, however, were necessarily involved or decreed in either one of such appeals.

It is, however, claimed that a minor is not bound by such acts, and that no consent can be used against him. I will hereafter refer more fully to this point and cite authorities which show that an infant is bound as to the conduct of his case by his solicitor as much as an adult.

2. *The evidence was not insufficient to justify the decision of the Supreme court, or the decree of November 13, 1871.*

Counsel argue this case as if the court had considered

all the evidence appearing in the record, and that it was necessary that all of it should be considered to sustain the decree. Complaint is made of the conduct of the guardian *ad litem* in not taking proper steps to exclude incompetent testimony and to suppress depositions which it is alleged were not taken in conformity with the statute. They seem to overlook entirely the statement in the certificate of evidence which reads as follows:

"And the court on objections being made to the competency of the evidence in each of the foregoing depositions contained, thereupon received them in evidence therein subject to all legal objections going to the sufficiency, competency and relevancy thereof under the pleadings in the said original and cross-cause; no objections being made, however, to copies of papers produced and read in place of the original thereof." (Rec., 352.)

This statement in the record shows conclusively that no consent was given by the guardian *ad litem* as to the evidence, except as to the consideration of copies instead of original papers; as to all other matters it is stated that objection was made and the court following the usages in the trial of judicial cases received the same subject to such objections. The presumption is that no illegal testimony was considered in reaching a conclusion. If there was enough evidence to justify the result reached, it is immaterial how much illegal and incompetent evidence was presented to the court.

The principal point made by Mr. Wilson in his argument is on a question of fact.

He contends that by the evidence, it appears that the deed of May 15, 1861, was made in contemplation of the entry of Gen. Buckner into the confederate army, and he

refers to the evidence in the case for the purpose of showing that a wrong conclusion on the facts was reached by the Supreme court as well as the Circuit court.

He states that the attention of the Supreme court was not called to the point which he now raises and refers to the opinion which he says contains no allusion to this phase of the case. It is true that the opinion does not take up and discuss in direct terms the effect of this testimony on this point, but it cannot have escaped the attention of counsel that the Supreme court directed the entry of a decree restoring the title to Mrs. Buckner, to her property, free from any title or interest from her husband. It may well be presumed that this result was reached by the court, not only because of the disclaimer in the cross-bill, but on consideration of this identical question. Aside from the absence of a formal discussion of this question in the opinion, there is nothing to show that the attention of the court was not called to this question, and that it was not fully considered. The counsel appears now in this case for the first time. He was not present at the argument of the cause, and therefore cannot know what questions were discussed. I happen to know that this, among other questions, was pressed upon the attention of the court in the oral argument and that none of the complaints of neglect now made, have any foundation in fact. It has never been my misfortune to meet a stronger opponent, and a more forcible defense than I encountered in the person of Judge Beckwith in this case.

In a suit of this character it is not competent for the court to consider errors as to the determination of facts, but only errors of law.

In *Griggs* v. *Gear*, 3 Gil., 10, the Supreme court of Illinois say:

"A bill of review may be brought for error of law which is apparent upon the face of the record itself. In such a case no question is raised as to the propriety of the determination of the matters of fact or the evidence upon which the decree is founded. But it is only upon matters of law as arising upon the facts which are to be taken as absolutely true, as stated in the decree, that any question can be raised. By decree here, must be understood not only the final judgment of the court, but the pleadings also, the substance of which according to the English practice, is recited in the decree. So that in passing upon the errors assigned in the bill of review the court will look through the bill, answer, the facts as found and determined in the original cause, and into the adjudication made thereon."

It has been the practice in Illinois to recite the conclusions as to facts in the decree itself, because of a statute which allows oral testimony.

The decree of November 13, 1871, recites:

"*And it appearing to the satisfaction of the court that the complainants in the cross-bill executed the deed bearing date May 15, 1861, to Henry W. Kingsbury, deceased, a copy of which was attached to the cross-bill and to the deposition of Simon B. Buckner as Exhibit A, and that the same was a deed of trust conveying the premises therein described to the grantee for the use and benefit of the grantors, to be conveyed upon request.*" Rec., 358.

The finding of the court as to that fact is in the record and it was recited in the decree, and is conclusive when a bill of review is filed for errors apparent on the face of the record.

This rule of law has been settled beyond any controversy.

Willamette Bridge Co. v. *Hatch*, 125 U. S., 7.
Whiting v. *Bank*, 13 Pet., 6.
Kennedy v. *Bank*, 8 How., 610.
Putman v. *Day*, 22 Wall., 65, 66.
Buffington v. *Harvey*, 95 U. S., 99.
Thompson v. *Maxwell*, 95 U. S., 397.
Beard v. *Burts*, 95 U. S., 391.
Shelton v. *Van Kleeck*, 106 U. S., 534.
Nickle v. *Stewart*, 111 U. S., 776.

It is scarcely necessary in view of these authorities that I should go into an examination of the deposition of Gen. Buckner.

The inference of Mr. Wilson, is directly contrary to the facts, taking the whole deposition into consideration. It appears that at the time the deed was made, he had no intention or even expectation of entering the confederate service; that the purpose of so doing was not formed until three days before he took that step, which was September 16, 1861, and that the deed was made to accomplish a purpose which had been in contemplation for two or three years.

It is true that the Supreme court in its opinion quoted from the testimony of Gen. Buckner, but it was only to establish the proposition that the deed had been delivered. His entire testimony might be stricken from this record without affecting the decree which was rendered. In the absence of his testimony, and that of Mrs. Kingsbury with the letter written to her by her son, there would have been no sufficient evidence of an express trust, but

there was proof by the other witnesses which would have established an implied trust. In either event Mrs. Buckner was entitled to a restoration of her property.

Gen. Buckner was a Competent Witness.

Admitting that Gen. Buckner would have been an incompetent witness by the rules of common law, because a party to the record, or because of the relation of husband and wife, or both, yet, by the statute of 1867, he became competent.

He is included in the language of the first section, which declares, "That no person shall be disqualified as a witness in any civil action, suit or proceeding, except as hereinafter stated, by reason of his or her interest in the event thereof, as a party or otherwise." By this provision he would be a competent witness in this case, unless he is within one of the prohibitions mentioned in the statute thereafter.

It is claimed that the second section does disqualify a witness occupying the position of Gen. Buckner. Let us see. The words are: "No party to any civil action, suit or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein *of his own motion, or in his own behalf*, by virtue of the foregoing section, when any *adverse* party sues or defends as * * * the heir * * * of any deceased person, * * * unless when called as a witness by such adverse party so suing or defending."

For the purpose of the argument it may be considered that Gen. Buckner was both a party and interested in the result of the suit, that the proceeding was against an heir of a deceased person, and that he was not called by such heir, yet he is not by these terms brought within the pro-

hibition, because, *first*, he does not testify of his own motion or in his own behalf; and *second*, the heir is not an adverse party within the meaning of the statute.

It is important to understand the position of the witness. The original bill makes him a party merely because he is the husband of Mrs. Buckner; there is no other reason whatever. There is no averment that he has done, or proposes to do, any wrong to the complainant, or claim any interest in the premises. No relief is asked against him, except to restrain him from interfering with the land or its issues. The cross-bill is filed in the name of Mary K. Buckner and Simon B. Buckner against Henry W. Kingsbury, the heir, and others. In the cross-bill, Simon B. Buckner, for himself, alleges that it was his intention, by the deed of May 15, 1861, to place the whole of the property in the exclusive control of his wife, and he only claims his legal and equitable rights in order to enable him to carry out such purpose, and offers to allow any decree the court may see proper to render, to confer the sole control and benefit of the property on his wife, her heirs and assigns.

The prayer of the cross-bill corresponds with this allegation.

The property was the separate property of the wife; the deed of May 15, 1861, was for her exclusive benefit, and the cross-bill was filed to declare and enforce that trust.

We therefore say that Gen. Buckner had no legal interest in the event of the suit, and that Henry W. Kingsbury was not an *adverse* party to him. The statute has no such narrow meaning as a person on the opposite side of a case; it frequently happens that co-plaintiffs or defendants are adverse in interest.

It also follows that Gen. Buckner did not testify in his own behalf, but in behalf of his wife. He did not testify of his own motion. His evidence was taken by commission issued according to the statute, on a notice given for the defendants to the original suit and the complainants to the cross-bill. The law compelled the evidence; it was not voluntary.

The only other provision in this statute which it is pretended prohibits the witness from testifying, is the fifth section. That section reads: "No husband or wife shall, by virtue of section one of this act, be rendered competent to testify for or against each other, * * * except in cases where the wife would, if unmarried, be plaintiff or defendant, * * * and except, also, in cases where the litigation shall be concerning the separate property of the wife; * * * in all which cases the husband and wife may testify for or against each other, in the same manner as other parties may under the provisions of this act."

This expressly declares, that by the provisions of the first section, a husband shall be a competent witness for his wife, where she would be a party, if unmarried, or where the controversy is in regard to the separate property of the wife. Gen. Buckner is admissible on either of these grounds.

It often happens that a party to a chancery suit has some interest in the result with another, but of a different character. In such cases the witness is competent, although the court will disregard the evidence as far as it promotes the interest of the witness, and will not grant relief in favor of the witness upon his own testimony. So here, Gen. Buckner was competent for some purposes, and could not be excluded entirely, though the court

would not, and did not, grant him any relief whatever. This court directed a decree to be entered, ordering a conveyance to be made to Mrs. Buckner *divested of the life estate of her husband.*

Mrs. Kingsbury and Gen. Burnside are also competent witnesses.

If Gen. Buckner is competent, *a fortiori*, Mrs. Kingsbury and Gen. Burnside are. Neither of them had the slightest interest against Henry in the litigation presented by the cross-bill. Mrs. Kingsbury was a co-defendant with him, and Gen. Burnside not a party at all.

The notice of the purpose to sue out a commission to take the deposition of Gen. Buckner was sufficient.

It is true that the statute requires a notice to be served by the party desiring a deposition on the opposite party, ten days before the time fixed for its issuance. But, as the object of this provision is to enable the opposite party to file cross-interrogatories, the time may be waived. This will not be denied, when the party served is an adult, but it is claimed that the infant cannot by his next friend guardian, or solicitor, waive this notice.

It will be impossible for the counsel to point out any injury that occurred to the infant in this case, or that could occur in any other, by such a waiver. It is a step in the case, subject to the management of the solicitor, and when time to his satisfaction is afforded, it is sufficient.

No authority has or can be cited to show that such waiver cannot be made. On the contrary it was decided long ago, that the solicitor representing an infant, might consent to the use of voluntary affidavits as evidence.

Tillotson v. *Hargrave*, 3 Mad., 494.

The point has been thoroughly considered and decided in

Ralston v. *Lahee*, 8 Clark (Iowa), 27.

It is said, however, that the notice was served and waiver made by Judge Beckwith, three days before he was appointed guardian *ad litem*. Such seems to be the fact, as the record *now* appears. It is probable that there was some mistake in making the transcript of the record in the date of the order, and the original is now destroyed by fire. However that may be, Judge Beckwith was the next friend of the infant in the original suit, and a service on him would be sufficient to sustain this deposition. Although it might be taken to use in the original pleadings, it could be read in support of the cross-bill in the same case.

But Judge Beckwith assumed to be the guardian *ad litem*, and he was not only the next friend and solicitor, but he became guardian by order of court five days before the commission was issued. This cured any defect existing and enabled him to file cross-interrogatories. The most that can be claimed is, that it is a harmless irregularity, and one which was waived by the omission to move to suppress.

The notice of the purpose to sue out the commission to take Barrett's deposition was sufficient.

The notice, in this instance, and the acceptance, were the same as in the former, except that the time was nine days, and the order naming the guardian had been entered.

The depositions of Mitchell, Shortall and Woodbridge were well taken.

There was an appearance and cross-examination by all

the parties. The notice was either given, or the object was attained without one.

Co. of Green v. *Bledsoe*, 12 Ill., 267.

There were no cross-interrogatories filed on behalf of the infant when the commissions issued, *but the same solicitors made a full examination of all the witnesses in the name of Mrs. Lawrence, who was the mother and guardian of the person of the infant.* No injury was done to the infant, but every fact was brought out, and he has had the benefit of it.

Unless such objections are made *in limine*, they are waived, and cannot be allowed on the hearing.

An objection to a witness because incompetent, must be made as soon as the facts showing interest, are known. Formerly the rule required that it should be made before an examination in chief, and, when a deposition was taken, that it should be interposed before proposing cross-interrogatories; but it is now relaxed so as to allow the objection to be made at a later stage, but not after the grounds are known.

1 Green on Evid., § 421, *et seq.*

In the case of *Moshier* v. *Knox College*, 32 Ill., 162, which was a chancery case, the court say: "The testimony of Patterson is objected to as incompetent on the ground of interest. It was taken in writing before the master in chancery, and reported to the court. * * * No objection was then made to him as incompetent for any cause, nor did the plaintiff in error move to suppress the deposition before the hearing; it was, therefore, too late, on the hearing to raise the objection. The rule has been long settled that an objection of this nature must be made before the trial of the cause.

Kimball v. *Cook*, 1 Gilm., 424.

In *Frink* v. *McCreery*, 4 *Ib.*, 577, this court said, it is a well established and universal rule on the circuit, that all exceptions to depositions that go to their form, or to the incompetency of the witnesses, must be made before the case is called for trial, and submitted to the jury. So in the case of *Webb* v. *The Alton M. & F. Ins. Co.*, 5 *Ib.*, 225, this court said, if the witness was disqualified on the score of interest, the objection should have been taken in the court below, by a direct application to exclude the deposition. A party is not permitted to remain silent while the cause is progressing, and then raise such objections at the hearing, or in the Appellate court."

The objections based on the service of the notice cover purely matters of form, which must be made by motion to suppress.

Corgan v. *Anderson*, 30 Ill., 95.
Lockwood v. *Mills*, 39 Ill., 602.
Phy v. *Clark*, 35 Ill., 377.

But the evidence is sufficient to sustain the decree of November 13, 1871.

The practice in chancery in regard to depositions is defined in *Swift* v. *Castle*, 23 Ill., 214.

It is there held that when a party conceives there is any irregularity or informality in taking proofs, he may move to suppress the depositions, but questions as to the pertinency of the evidence, or as to what is material and proper to be considered in rendering a decree, are reserved to the hearing. The chancellor considers that only which is legal evidence. It follows that the court does not reverse because there is illegal evidence in the record filed in the appellate court, but the inquiry is, whether there is sufficient evidence to sustain the decree.

It is assumed by counsel that if the testimony of Gen. Buckner is rejected, there is nothing on which relief could be afforded under the cross-bill. This is an error.

This court, in the opinion, decided that the making and filing of the deed of May 15, 1861, without the knowledge or assent of the grantee, was not a delivery, and his assent is found in the evidence of Buckner, who first informed Henry of the conveyance. But the court also found the language which was then used to be an acceptance of the trust, as well as the deed. There is no other evidence of this conversation, and this is the only fact referred to in the opinion as proved by Buckner, which does not appear by other testimony. Suppose his deposition is rejected: one of two things would follow, either there would be no evidence of the delivery of the deed, and the title would be left in the grantors, or some other evidence must be found in the record to show the assent of Henry, so as to constitute a delivery of the deed.

The next occasion, when Henry is shown to have required any knowledge of the deed, is proved by Mrs. Kingsbury. She says: "In August or September, 1861, here, in Old Lyme, I had a conversation with my son. I asked him in regard to his sister's property, whether it had been turned over to him (Henry), and told him Simon had told me so. He replied, '*That is so, but don't look concerned; it is only turned over to me for safe keeping; it will be restored to her.*' (Rec., 111.)

This language, while it implies assent to the deed, yet more explicitly than the brief conversation in Washington between Gen. Buckner and Henry W. Kingsbury, proves the express trust for Mrs. Buckner. This view would relieve the case of all embarrassment in regard to the admissibility of this conversation to show the terms of the trust.

Or, in other words, the evidence of Gen. Buckner is not prejudicial to the infant, but rather in his favor, because it proves the delivery of the deed and leaves more doubt as to the sufficiency of the evidence to bring the case within the rule required by the statute of frauds.

The next occasion when Henry is shown by the evidence to have acted touching the conveyance, is proved by the letter of October 23, 1861, in which he says: "*I spent all the morning with Burnside yesterday. He states, as I told you, that Simon had made over all the Chicago property that was held in his name to me. A new power of attorney is therefore necessary from you and myself. We made one out. I signed it. Burnside will send it to you. I send you a copy for your own keeping, and keep one myself.*"

The power of attorney mentioned, was from Henry and his mother to Gen. Burnside, dated October 22, 1861, authorizing him to manage all the business of the Kingsbury estate in Chicago.

This would make the delivery of the deed relate back to the time of the conversation with Mrs. Kingsbury, and prove the express trust.

The court held in the opinion that the trust was manifested and proved by the letter of October 23, 1861, with power of attorney, referred to therein, and by the will. Without the deposition of Gen. Buckner, the terms of the trust were proven by these papers, and the conversation by Henry with his mother referred to in the letter. The result in this case would not be affected by rejecting the evidence of Gen. Buckner.

But if there was a failure to prove an express trust, the evidence would effectually prove an implied trust, and the

result would have been the same. If there was sufficient legal evidence in the record to sustain the decree of November 13, 1871, it is not material to determine whether there was illegal testimony in the record or not.

An appeal bond is not a condition of the jurisdiction of an appellate court. The appellee is entitled to one for his protection. The appeal is effected when one is allowed. If no bond is filed when that is made a condition, either by order or statute, or an insufficient one is filed, a motion to dismiss will be sustained, unless the omission is supplied. But if no objection is made, and the appellee appears and submits the cause, there is no want of jurisdiction.

The case of *C., P. & S. R. R. Co.* v. *Trustees, etc.* 104 Ill., 91, cited by Judge Trumbull, does not decide there was a want of jurisdiction, after an appearance and submission. There the order allowing the appeal was not complied with, and no transcript was filed. A motion was made to affirm and answer was made that subsequent to the allowance of appeal, a bond had been made. But the court merely held the case was improperly on the docket and struck it therefrom.

III.

NONE OF THE ALLEGED ERRORS ARE AVAILABLE TO THE APPELLANT, BECAUSE HE WAS A MINOR.

If Henry W. Kingsbury had been an adult when these proccedings were had, there would be no claim of error. But it is alleged that the case could not be taken up for hearing in the Circuit court before the adult parties could force a trial; that the appeal could not be prosecuted to

the Central grand division by consent; that an appeal bond could not be waived; that the time of the statutory notice for taking depositions could not be shortened by agreement, and that the solicitor of the minor party could agree to nothing or waive nothing during the progress of the proceedings before the court. This contention rests entirely on the fact that the original complainant, one of the defendants to the cross-bill, was an infant under twenty-one years of age.

At the threshold, it is important that the character of his case should not be lost sight of—that it should not be confounded with others unlike it. In this case the infant entered court by his next friend, to contest the claims to the defendants; the cross-bill was filed as a part of the defense, and a guardian *ad litem* was appointed. The person selected as guardian was not suggested by the opposite party as a mere matter of form. The same individual who had filed the original bill, as next friend, was appointed by the court as guardian. He was also solicitor for the adult parties in interest with the infant, one of whom was the mother and guardian of the person, and the other her present husband, and eminently fitted for the discharge of his duties. The usual and formal answer was not put in for the infant, but one special in its character, making all the defenses which could be made by an adult. The witnesses were all cross-examined by the the solicitors for the mother of the infant and her husband, developing fully all the facts. The trial and argument were not matters of mere form, but the original bill was prosecuted and the cross-bill defended for the infant by the person who was next friend, guardian *ad litem*, and solicitor, with all the ability and vigor possible. If all the points made by the present counsel were not made for the

infant, it was because, in his judgment, they could not be sustained.

We apprehend that different treatment is required in such a case from one where the infant had no real representative, and the case is conducted *ex parte* by the opposite party.

We very freely admit that the law requires service of process on an infant defendant, and that jurisdiction cannot be acquired of his person, by the appearance of a solicitor. It is true, however, that he may submit to the jurisdiction of the court by a voluntary appearance as plaintiff by his next friend, and a decree rendered in such case will bind him the same as an adult. We admit unreservedly that a decree cannot be taken as confessed against the infant, or upon admissions in the answer of the guardian, which may be prejudicial to the infant. It is true, too, that the court scrutinizes the proceedings with closeness where an infant is interested. The law likewise gives him the privilege of reviewing the proceedings by an original bill, instead of a technical bill of review; it allows either a day in court, or writ of error, or bill to set aside a decree after he reaches his majority.

These, however, are the chief, if not the only advantages allowed, because of infancy. In the conduct of the proceedings, it is the duty of the court to see that the rights of the infant are protected, to appoint some one competent to represent him, and compel him to perform the duties of the place. The proceedings being conducted under the eye of the court, with these safeguards, the infant is bound the same as an adult, in the actual management of the case by those representing him. In all litigated cases in chancery, the infant is represented by solicitor as well as by guardian or next friend. It has al-

ways been the practice in such cases, to conduct the proceedings, so far as evidence and trial is concerned, for an infant, the same as for an adult. The reason is that admissions may be made for the benefit of an infant, and where the court can see that it is for his benefit, the proceeding being in the presence of the court and subject to its control; in such cases the admission will be sustained and bind the infant. The reasons securing him the privileges accorded, do not apply to such a case. Any other rule would clog the wheels of the court and work great injustice.

It is the practice in England, and in some of these states, to allow an infant a day in court when he reaches his majority, to show cause against the decree, and an omission of such a provision has been held to be an error which would reverse the judgment. But that rule has been confined to cases where a conveyance was required, which could not be executed until the defendant attained full age. In other cases no such provision was necessary, and the infant was concluded by the decree as much as an adult person.

Chambers on Ch. Jur. of Infants, 772, 795, 799.

But no such practice prevails in Illinois. There the right of appeal or writ of error, or bill of review exists for five years after a minor becomes of age. He can show cause by one of these methods, but no other. Subject to these provisions he is as much bound by the provisions of a decree as an adult.

Enos v. *Copps*, 15 Ill., 278.
Barnes v. *Hazzelton*, 50 Ill., 430.
Wadhams v. *Gay*, 73 Ill., 424.
Hess v. *Voss*, 52 Ill., 472.
Lloyd v. *Kirkwood*, 112 Ill., 337.

"An infant is as much bound by a decree and *by all the proceedings in a cause as a person of full age*, and cannot, nor can his representatives open proceedings, unless upon new matter, or on the ground of gross laches, or of fraud and collusion, which will annul the proceedings of courts of justice as much as any other transaction. The knowledge of the next friend (if there is no collusion) is the knowledge of the infant; and, generally speaking, the latter is as much bound by the conduct of his solicitor in the progress of the cause."

McPherson on Infancy, 386.

"The weight of authority is that an infant defendant is as much bound by a decree in equity or a judgment at law as a person of full age, and if a judgment or decree be absolute against him he will not be permitted to question it, except upon the same grounds that a judgment can be questioned by parties *sui juris*; that is, for fraud, collusion or error."

Herman on Res Adjudicata, 179.

"The general tendency is to regard the plea of infancy as a personal plea which may be waived. And whether such plea is interposed or not, a judgment or decree against an infant, properly before the court, is as obligatory upon him as though he were an adult, except in cases where he is allowed time, after coming of age, to show cause against the judgment or decree. If an absolute decree be made against an infant he is as much bound as a person of full age, and will not be permitted to dispute the decree, except upon the same grounds which would be available if he were an adult."

Freeman on Judgments, § 151.

"A judgment against an infant is not void. The usual

practice is to insert a provision allowing an infant a day after he becomes of age to show cause against a decree pronounced against him. And except where the practice has been changed by introducing a modification of the common law in this respect, the omission of this clause is an error which will undoubtedly be corrected on appeal. According to some of the authorities, the right to show cause against a decree is the absolute right of every infant defendant; a right which is not taken away by the omission to provide for it in the decree, and which may be enforced by bill of review or by original bill, showing that upon the facts the original decree is improper. But the better opinion is that, 'an infant defendant is as much bound by a decree in equity as a person of full age; therefore, if there be an absolute decree made against a defendant who is under age, he will not be permitted to dispute it, unless upon the same grounds as an adult might have disputed, such as fraud, collusion or error.'"

Freeman on Judgments, § 513.

Dan. Ch. Pr., 205.

In *Tillotson* v. *Hargrave*, 3 Maddox Ch., 494.

One argument in support of a motion in above case was that the solicitor who was said to have concurred in the use of affidavits was concerned for infants, and that his concurrence could not bind them; but as to that the vice chancellor observed that generally speaking, infants were bound, as much as adults were, by the conduct of their solicitor.

In *Wall* v. *Bushby*, 1 Brown's Ch. Cas., 484.

Held that a decree taken by consent will bind the infants in the case, because it is presumed the court proceeded on the idea it would be for their benefit.

"Generally speaking, the latter is bound by the conduct of his solicitor in the progress of the cause."

McPherson on Infancy, 386.

In *Levy* v. *Levy*, 3 Mad., 131, the vice chancellor said: "An heir is in these cases entitled to an issue, *devisavit vel non;* the court cannot refuse it if asked for; but if the counsel for the infant heir is clear, from the evidence, that there is no ground to impeach the will, he is well justified in declining to ask for an issue."

In *Gregory* v. *Molesworth*, 3 Atk., 626, the lord chancellor says: "She is as much bound, though an infant, as a person of full age; I know of but one case that is an exception, *Lord Effingham* v. *Sir John Napier*, 2 Peere Wil., 401. * * * It is right to follow the rule of law, where it is held that an infant is as much bound by a judgment in his own action, as if of full age; and this is general, unless gross laches, or fraud and collusion appear in the *prochien ami*, there the infant might open it by a new bill."

It is decided in *Morrison* v. *Morrison*, 4 Mylne and Craig, 225, that infant defendants are as much bound by a waiver of irregularities as an adult.

See, Also 1 Dan. Ch. Pr., 4 Am. Ed., 163.
Tillotson v. *Hargrave*, 3 Mad., 494.

In *Ralston* v. *Lahee*, 8 Clark (Iowa), 27, the court say, ".The fourth objection is based on the reception of evidence by the court, by permission of the guardian, which was otherwise inadmissible; the objection refers more particularly to the affidavits of certain persons, made and filed in the cause, and used by consent of parties, instead of the testimony being taken upon interrogatories, in the usual form of depositions. Infants are

as much bound by the conduct of those who conduct their cause as adults, provided their conduct be *bona fide*, and it has been held * * * that if the solicitor for the infant assents to and acquiesces in the mode of proceeding, the infant will be thereby bound."

If the answer contain any admission, which it is expressly for the benefit of the infant to make, as where an infant claims an interest under the same instrument as the plaintiff, and as where the party claims as devisee under a will, and the infant defendant claims also as devisee, but is heir at law of the testator, no further proof is necessary, and the cause may be set down on bill and answer without replication.

McPherson on Inf., 406.
1 Dan. Ch. Pr., 240.

In *Brook* v. *Hereford*, 2 P. Wms., 519, a testator devised certain property to two grandchildren and their heirs. One of the grandchildren died, leaving an infant. This infant brought this bill for partition. The Lord Chancellor decreed the partition. Then it was objected that the will of the testator under whom the infant plaintiff Brook claimed was not proved, but the court said: "This will not be material; for an infant, *when plaintiff*, is as much bound, and as little privileged as one of full age.

In *Hanna* v. *Spotts' Heirs*, 5 B. Mon., 362. This case decides the same thing, viz: that infant *complainants* stand exactly like adults and have no more right to question the decree hereafter, than if they were adults.

In *Williamson's Heirs* v. *Johnson's and Nash's Heirs*, 4 Mon. (Ky.), 256, the court say: "Another objection is that no time is given in the decree to the infant heirs

of Williamson [the plaintiffs below and in error] to show cause against it. That was not necessary, because as infant *complainants* they are bound by the decree."

In *Jameson* v. *Moseley*, 4 Mon. Rep. (Ky.), 414, Mosely exhibited his bill against defendants, some of whom were infants. Court entered an interlocutory decree—from which, by consent, both sides appealed. The Court of Appeals entered a final decree, with directions. After the mandate was entered in the Circuit court some of the infants, who had arrived at full age, presented an answer and petition to open the decree. The lower court refused and the decision was affirmed on appeal.

The court say:

"When the decree of 1819 was pronounced in the Appellate court, and that opinion, decree and mandate sent down to the Circuit court to be executed, it was final in its effects, and beyond the power of this court or that to change, reverse or annul. * * * In an anonymous case, 7 Cranch, 1, and *Skellern's Executors* v. *May's Heirs*, 6 Cranch, 267, similar attempts to rehear or avoid the decree of the Supreme court of the United States received the like decision in that court, to which many more examples might be added. A contrary decision would involve the contradiction of an appeal from a decree of the appellate tribunal to itself.

* * * * *

"*But it has been argued that this case is an exception because of the infancy of some of the defendants.* The interests of infants are in the general so far regarded that no decree in the courts of original jurisdiction should be pronounced against them, without giving day to show cause after full age; and the rule is, that an infant arriving at

full age, may put in a new answer, make defense and examine witnesses anew. So it is ruled in *Bennet* v. *Lee*, 2 Atk., 531, *Napier* v. *Effingham*, 2 Pr. Wms., 403. *But an infant when plaintiff* is as little privileged, unless under extraordinary circumstances, and is as much bound by a decree, as a person of full age. So the rule is laid down in *Gregory* v. *Molesworth*, 3 Atk., 627; *Brook* v. *Hereford*, 2 Pr. Wms., 519, and *Bennet* v. *Lee*, 2 Atk., 531. The present appellants *were plaintiffs* in an appeal in this cause, against Moseley formerly, upon their complaint, and in Moseley's cross-appeal, the decree of 1819 was pronounced; no day was given in that decree to show cause against it, and there is no precedent in this court to show cause against it, and there is no precedent in this court of such reservation in decrees, to which infants are parties."

The only case cited by appellant's counsel to the effect that a deposition of an incompetent witness, not objected to for that reason, will be disregarded in rendering a decree, or that the guardian cannot consent to the use of a deposition not taken in pursuance of law, in the case of *Fischer* v. *Fischer*, 54 Ill., 231.

We have been unable in all our researches to find any other. That case was argued *ex parte*, and the decree was properly reversed. The ground on which the reversal is placed, was a want of service on the unnamed infant. While the other points mentioned were properly before the court, yet after the decision of the case on the other ground, these remarks were, perhaps, in the nature of *dicta*. It was also apparent in that case that no defence had been made, that the case was conducted by collusion between the mother of the child and the complainant. It is clearly distinguishable from the case now under consideration, and it seems to us, so far as it re-

jected the deposition of the party on the ground of incompetency, not sustained by authority. The objection to the deposition of the other witness was that it was not taken before any officer, and did not constitute even an affidavit.

An Illinois case as to the effect of a judgment where an infant is plaintiff is that of

McClay v. *Norris*, 4 Gilman, 383, where a writ of error was sued out by an infant to reverse a decree of foreclosure in the Circuit court. It was objected that the infant had no right to a writ of error, but must bring a bill in the lower court.

The court after citing the act of July 1, 1829, regulating the Supreme and Circuit courts say:

"This statute is broad and comprehensive in its terms, and seems designed to embrace every case in which an erroneous decree or judgment may have been rendered in the Circuit court. Such a construction of this law cannot operate to the prejudice of any parties. For if an infant sues out a writ of error, and a decree in this court is passed against him, such decree would be conclusive as well against him, as it would have been, had he attained full age, both under the provisions of the statute before recited, and upon the principle *that he is a plaintiff* in the writ of error, and as such, concluded by the judgment or decree. *Williamson's Heirs* v. *Johnston & Nash's Heirs*, 4 Mon., 255.

"It must be apparent, then, that it is most beneficial to the opposite party that an infant should prosecute his writ of error at the earliest period after any error in the record may have been discovered, without waiting until he arrives at full age. For it cannot be disputed, that

when his minority had ceased, he would by the English practice, in a case like the present, be entitled to show error on the face of the decree, the effect of which would be to reverse the judgment in the same or a similar manner, and with like effect upon the interests of the parties, as would result from a reversal in this court."

In *Joyce* v. *McAvoy*, 31 Cal., 273, the court say:

"An infant defendant is as much bound by a decree in equity as a person of full age, and will not be permitted to dispute it, except upon the same grounds as an adult might have disputed it, such as fraud, collusion or error. If merely erroneous, it is not void, but may be corrected on appeal. If fraudulent, or obtained by collusion, it must be attacked in a direct proceeding, and cannot be attacked collaterally. A judgment against an infant where the court has jurisdiction, which does not give the infant a day after arriving at age, to show cause against it is not void, and cannot be attacked collaterally."

In *Brown* v. *Armistead*, 6 Rand. (Va.), 594, the court say, page 602:

"The question is, whether a dismission of the plaintiff's bill would not so far bind the infants as to preclude them hereafter from impeaching the title of plaintiff. I incline to think it would. I know very well that the general rule is, that an infant defendant is not bound by a decree, if when he arrives at age he can show error in it; and to enable him to do this he has a day given him, which is generally six months after he comes of age. But an *infant plaintiff* is as much bound by a decree as an adult. Even an infant defendant may be bound by a decree, if made for his benefit."

It will be remembered that the infant was an appellant

in the Supreme court, as well as an appellee; that he was a complainant in the original bill, as well as a defendant in the cross bill; and that the final decree was entered when and where both bills were pending. According to all the cases, some of which we have cited, the infant is as much bound by the decree in such a case as an adult, and can only get behind it for such causes as would be available to a person of full age.

There is no suggestion that injustice has been done the infant; that any evidence has been omitted which would be for the benefit of the infant or change the result. The idea seems to be to obtain a reversal of the former decrees for any reason, and then if the court will hold the witnesses to be incompetent, the infant would be able to hold this immense property for the want of proof, and not because he is equitably or honestly entitled to it. Does such an object command the approval of this court, or of any honest mind? The infant stands, in the effort to go back of the adjudication and to obtain a rehearing, as a plaintiff. Will the court aid such a plaintiff? The rule is established that a court will not aid a voluntary grantee, who holds without consideration. The appellant is that, and more too, a dishonest trustee.

Counsel say all they want is an opportunity to make a defense, yet no defense is set up. It is not even suggested that any new evidence exists, or that the result could be changed. Judge Beckwith in the answer to the cross-bill, and in the original bill itself presented all that could be advanced in favor of the claim of ownership of Henry W. Kingsbury. But it is said Gen. Buckner was an incompetent witness, that Mrs. Kingsbury was also incompetent. As I have before shown there is nothing in these legal propositions, and their testimony is disregarded.

The cause of Mrs. Buckner was fully sustained. There can be nothing to commend a case to a court of equity, which must stand on the suppresion of the truth, where justified by rules of evidence or not.

I have nothing more to say on this branch of the case. There are no errors of law on the face of the record of the original suit, which would reverse the decrees, on an appeal, or writ of error, or bill in equity. The appellant is estopped by the judgment of the Supreme court of Illinois, rendered on the second appeal, November 8, 1873, on the same errors then assigned, from again asserting them. The principal decree of November 13, 1871, which settled the title to the property was the decree of the Supreme court, a court of last resort, and such a decree cannot be impeached in a lower court for errors apparent on the face of the record. The only remedy would be by an application to that court; it could not be made successfully to the Circuit court.

If there was no collusion, fraud, or gross laches, the decree dismissing the bill was not erroneous.

IV.

THE COLLUSION, FRAUD AND LACHES ALLEGED IN THE BILL WAS NOT PROVED.

Having fully discussed that branch of this case relating to the errors alleged to appear on the face of the record, the remaining question is as to the alleged collusion and fraud.

I have not deemed it necessary to refer to the nature of this bill. The rule of law certainly allows an original bill to be filed by an infant or adult to set aside a judg-

ment which has been procured through collusion or impositions practiced on the court. An infant may file an original bill where the complaint is as to errors on the face of the record. It is quite immaterial in this case what the bill shall be called. The ground of relief is first, errors apparent upon the face of the record; and, second, collusion and fraud.

The bill claims that there was a failure on the part of Judge Beckwith, who was next friend and guardian *ad litem*, to claim all the advantages in behalf of Henry W. Kingsbury which he might have asserted in his behalf. These things consist, in allowing two commissions to be issued for the taking of depositions, one upon a service of eight days, the other upon a service of nine days, when, by statute, he was entitled to ten days' notice, and of a failure to object to said depositions for that reason when they were returned; of a failure to cross-examine the witnesses as next friend or guardian *ad litem;* of a submitting the case for final hearing in the Circuit court at a term before that at which he could be compelled to go into a hearing; of consenting that the appeals should be prosecuted to the Central Grand Division instead of the Northern Grand Division, thereby anticipating the time when he could be compelled to submit the appeals by two months; and, of a failure to apply for a rehearing in the Supreme court.

These matters appear of record. Mr. Wilson claims that they are sufficient to establish the charge of collusion, fraud and laches.

The bill, however, goes further, and charges that the decree was obtained by fraud and misrepresentation, and by the concealment of facts material to the controversy, and by the use of false and fraudulent pleadings and tes-

timony. That Judge Beckwith had been counsel for Buckner and had knowledge of these facts, and collusively assisted the Buckners in such concealments; that General Buckner and Mrs. Kingsbury were incompetent witnesses, and that he permitted their depositions to be used without objection; that after the cross-bill, answer thereto and replication were filed, the cross-bill was fraudulently altered by inserting allegations with reference to the letter and the conversation alluded to therein, in said cross-bill; that the cause was never submitted to or heard by any judge of the Circuit court; that a judge who had no knowledge of the proceedings or the matters in question was induced to sign a certificate of evidence, and, in short, that the case was a contrived one by agreement between Mary K. Buckner and her husband, Simon B. Buckner, made with Judge Beckwith, the next friend, and guardian *ad litem*.

These serious charges in the bill were false and libelous. Not the slightest effort was made to prove them. John V. LeMoyne was the guardian of Henry W. Kingsbury when the testimony was taken before the master and when the final hearing was had in the court below. The record shows that he was present when the evidence was taken, and on such final hearing, yet not a syllable of evidence was introduced to prove these grave charges.

Mr. Wilson in his argument complains that Judge Beckwith and General Buckner were not placed upon the stand by the defendants to contradict these statements. Judge Trumbull in his argument refers to the charges in the bill and treats them as if proven. Among other things he refers to an affidavit of Wherland, which was no part of the testimony and was copied in the transcript by the clerk in error. The stipulation filed in this case signed

by counsel on both sides admits that such affidavit was never offered in evidence. It is true that the record in the Supreme court produced before the master and attached to his report as Exhibit G, refers to an affidavit of Wherland and other papers as the foundation of a motion to vacate the former judgment and recall the mandate, but the matters submitted to the court in opposition to such motion do not appear in the record. It is shown that the motion was denied. I would have been quite content to have the affidavit of Wherland, and the other papers accompanying it as the foundation of that motion, appear in the record if the affidavits which were filed in opposition thereto could also be considered. As such affidavit has been inserted and printed in the record, I think it no more than justice to the assailed parties to state to this court that the motion was answered by affidavits of Simon B. Buckner, Corydon Beckwith, Benjamin F. Ayer, Francis H. Kales, George Chandler, and W. C. Goudy, all of the persons who could be supposed to have any knowledge in regard to these matters. If the complainant in the present case had seen fit to call Wherland as a witness, or to introduce any further evidence tending to show the alleged collusion, it then would have devolved upon the defendants to produce their evidence to contradict and meet such testimony. Doubtless the reason why no such evidence was attempted was because Mr. Le Moyne well knew that it was not founded in truth, and could be successfully overcome.

Considering the high standing and reputation of Judge Beckwith, saying nothing about that of General Buckner, such charges seem to call for no answer. It is incredible that a man of Judge Beckwith's character and standing should intermeddle in a litigation in which he

had no concern, and in regard to which he was not employed. The idea that he filed the original bill without the authority of the immediate relatives of the infant, or that he conducted this litigation without their approval is absurd. If such charges were true, his name ought to be stricken from the roll of attorneys, but such charges are too contemptible to demand any serious answer from him.

It is true that he permitted commissions to issue without requiring a ten days' notice, and that he did not object to the depositions for want of a notice for that length of time when they were subsequently filed.

It is true that he might have postponed the final hearing from the 31st day of December, when the case was submitted, until the last of the following month. It is true that he might have required the case to go to the Supreme court in March, at the term to be held at Ottawa, instead of in January preceding, at a term to be held in Springfield. It is also true that he didn't cross-examine the witnesses on behalf of the infant, but he caused a far wiser course to be pursued. Proceeding upon the theory that an infant admitted nothing, and that the cause must be proved as against him, he caused his partner, Mr. Ayer, to file specific objections to many of the interrogatories and to particularly cross-examine the witnesses on behalf of Mrs. Lawrence, the mother of the infant. (Rec., 283, 295, 305, 315, 332.)

In this manner Judge Beckwith served the interests of his infant client effectually, without in any way waiving any of his rights.

It is not true that no question was raised in regard to the competency of the witnesses or the relevancy of the

testimony. On the contrary, as heretofore stated, the record shows that such objections were made, and the evidence received subject to them.

What prejudice could possibly arise to Henry W. Kingsbury by allowing a commission to issue upon a notice one or two days shorter than the time required by statute?

What injury would be inflicted upon him by a final hearing of the case in December instead of January? How would he be harmed by a submission of the case to the Supreme court in January instead of March? What fact could have been elicited from the witnesses by interrogatories propounded in his name instead of the name of his mother?

It is admitted that this cause was speeded; that it was determined in less time than usual in such cases. But how was Henry W. Kingsbury harmed thereby? Is it the interest of an infant to prolong the litigation about his property? Was all the time that could be obtained in court for the conduct of the case to be insisted upon and thereby his expenses increased? Was it necessary to infer a fraudulent purpose because the final disposition of the case was advanced? There is no presumption of an improper motive because of the speeding of a case. On the other hand the presumption would be, if any existed, that there was some good reason apparent to his representatives in court, and to the court itself, why an early disposition should be obtained.

It appears from the record in this case that another bill was pending filed by Mrs. Eva Lawrence, to which Mrs. Jane C. Kingsbury and this infant were parties; that all of the property of the estate was then in the

hands of the receiver; that the rents were large, and the expenses necessarily great; that the property was improved; that the buildings were burned in the great fire of 1871, and large amounts of insurance money collected. It may well be assumed that the interests of these parties was to determine the ownership of the property and rescue the management of it from the hands of the receiver. But, I may be allowed to suppose, as a matter of argument, that there were ground leases of this property about expiring, and that the ground was occupied by buildings owned by the tenants who were entitled to a renewal of the leases or to payment for their buildings, and that no new leases could be executed because of the existence of this controversy, and for these reasons that it was the interest of Henry W. Kingsbury to have the court speedily determine who were the owners of the property. I might suppose other facts which would be consistent with the action of his solicitor and friends in consenting to an earlier decision of the case. Certain it is that there is no necessary conclusion of a fraudulent purpose to be drawn from such action.

What questions did Judge Beckwith, as next friend, guardian *ad litem*, and solicitor, raise in this controversy? It appears from the original bill and from the answer to the cross-bill, as well as from the opinion of the Supreme court, that every substantial question was raised. Henry W. Kingsbury, by inheritance, held the legal title to an undivided one-half of this property, and such title had been derived through a deed made by his aunt to his father. There was no evidence whatever attainable which would show that Henry W. Kingsbury, the father, purchased this property from his sister. The deed was a voluntary one upon its face. The only defense which

could be made was the claim that there was a want of legal testimony to establish the proposition that Mrs. Buckner was still the owner of the property and entitled to a reconveyance of the legal title, and to that end to insist upon the provisions of the statute of frauds, which required a certain kind of evidence. Judge Beckwith was justified in the belief that there would be a want of testimony to sustain the claim of Mrs. Buckner. Nothing but the inherent justice of her cause enabled her to succeed. A court, without any strained effort, could have so applied the rules of law as to defeat her, but it was evident to everybody that Mrs. Buckner was equitably entitled to a reconveyance of the property. That fact, and that fact alone, enabled her to obtain a decision in her favor, and an application of the rules of law so that such a result could be accomplished. Judge Beckwith presented as a defense to the cross-bill, and in maintenance of the original bill, every question which had any substance or merit in it. The solicitors who have since been complaining of his management might have undertaken to protect the interests of this infant, by moving to suppress the depositions for the want of a ten days' notice; by objecting to a hearing in December and claiming that the case should be heard in January; by insisting that an appeal should be taken to the Northern Grand Division; by claiming the filing of the appeal bond, which only would recover the costs, to be made and paid by the appellant; by filing cross-interrogatories to the witnesses in the name of the infant, and, in short, to insist on a technical compliance with every rule of practice. But, *cui bono*, would that change the result, or have enabled Henry W. Kingsbury to hold this property? If a motion had been made to suppress the depositions and it

had prevailed, a new commission would have been issued. If objection had been made to hearing the case at the time it was submitted, it would not have been heard until the later date; and so on to each of these other questions.

It is to be particularly remembered that it is not pretended that any evidence could have been produced by Judge Beckwith to contradict or qualify the testimony submitted to the court. It is not now claimed that if a rehearing could be had that any new testimony could be introduced, or that a different result would be reached. The object seems to be to obtain a rehearing, with the hope that in the lapse of twenty years, by the death of witnesses or the loss of evidence, Henry W. Kingsbury may be enabled to hold this property against justice and equity.

If the alleged errors appearing on the face of the record, were not sufficient to procure a reversal in the Supreme court of Illinois, they are not sufficient evidence to justify a conclusion of collusion and fraud, and it is not now pretended by counsel that there is any other evidence to justify the averments of the bill on that subject.

V.

THE STATEMENT IN THE DECREE APPEALED FROM, THAT NO REPLICATION HAD BEEN FILED TO THE ANSWER, DOES NOT JUSTIFY A REVERSAL.

The filing a general replication to an answer in a chancery suit is only a mere form. Where parties proceed to a hearing upon evidence in the absence of one, the court will not allow the answer to be taken as true; it

will be assumed that one was filed, and the case will be heard upon that theory. It is quite immaterial whether one was filed or not, when there was no evidence introduced by the complainant to support his bill, and the statement in the decree, being error, is not injurious to the appellant.

It may fairly be inferred that if a replication was on the files when the decree was rendered that it was mislaid, so that one did not appear. The record now shows that a replication was filed May 1, 1878, and an order entered on the 27th of April allowing a replication to be filed. (Rec., 198.) Another order was entered on the 20th of May, 1878, by which the one of April 27th was vacated, and Mr. LeMoyne, guardian, etc., then asked leave to file a replication to the plea and a replication to the answer, which the court allowed upon condition that the hearing should not thereby be delayed. (Rec., 203.) It may fairly be inferred that there was no evidence on the files on the 20th of May, that a replication had been filed on the first of May. Mr. LeMoyne then made application for leave to file at that time, which was allowed. I will not undertake to say that these replications were not filed on the first of that month, but it would seem that if filed, that fact was not known to the court nor to counsel, nor even to Mr. LeMoyne, who had filed them. If there was any objection for the want of a replication when the cause came on for final hearing, that objection should have been made known. This record shows that the bill was filed August 11, 1873; that a demurrer was introduced, and no steps were taken by the complainant to prosecute the suit until April 16, 1877, when it was dismissed for want of prosecution; on motion of complainant's solicitor that order was set aside

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Saber vs Cooper 7 Pk 569
Nat. Bk. vs Ins. Co. 104 U.S. 77

and the case restored to the docket. The case was immediately removed on the petition of the complainant from the State court, and it appears that from that time the defendants were insisting upon a hearing. The court made orders indicating that further delay would not be allowed. The record shows that the parties, by their solicitors, were present at the final hearing, and no point was made as to the want of a replication.

As no testimony whatever was introduced to sustain the bill, the absence of a replication is not error.

VI.

THE DEMURRERS OF JUDGE BECKWITH AND MRS. KINGSBURY WERE PROPERLY SUSTAINED.

One of the errors assigned by appellant is the action of the court below in sustaining these demurrers. It is claimed that thereby the parties who filed them admitted the statements of the bill to be true, and, as they were sufficient on their face to obtain relief, that the demurrers should have been overruled.

Neither Judge Beckwith nor Mrs. Kingsbury were necessary, or even proper parties. Mrs. Kingsbury had a dower interest in all the property of her husband. It was immaterial to her whether the fee was owned entirely by Henry W. Kingsbury, or by Mrs. Buckner, or by both; her interest would not be affected. She had no interest whatever in the original suit except to have her dower allowed in all of the property. It was of no consequence to her whether the decree should be set aside or not, so far as it decided the question of ownership between her children.

Judge Beckwith had no personal or pecuniary interest in the result of this suit. No decree was sought against him, none could have been rendered. No admission of his by demurrer could justify the court in setting aside the title vested in Mrs. Buckner by the decree. For these reasons there was no error in the action of the court below in sustaining these demurrers.

VII.

THE DECREE DISMISSING THE BILL MUST BE AFFIRMED BECAUSE THE PARTIES WERE NOT BEFORE THE COURT TO ENABLE IT TO GRANT ANY RELIEF TO THE COMPLAINANT.

There is an averment in the bill that Mrs. Buckner had made a deed to Wooley and that Wooley had made a conveyance to Gen. Buckner, but there is no evidence whatever to sustain such an averment.

The decree which the complainant sought to impeach, divested Gen. Buckner of all interest in the property, and established the right of Mrs. Buckner to that portion set off to her by the commissioners in making the partition. No one of the other defendants had any interest in that question. Gen. Burnside was made a party because he was named as an executor in the will which was revoked by the posthumous birth. John J. D. Kingsbury was made a party because he was named as a legatee. As Henry W. Kingsbury succeeded in a decision against the will, he does not now complain of the decree on that point. Mrs. Eva Lawrence and Mrs. Kingsbury were made parties because of their respective dower interests. There is no dispute in regard to them. The material and necessary parties to the bill which sought to impeach the decree in

the original suit, were Henry W. Kingsbury, who was the complainant, and Mary K. Buckner, who was the real defendant. She was made a party and her appearance was entered by filing a demurrer. (Rec., 177.) Before the decree was entered on the 19th of July, 1878, Mrs. Buckner was dead, and by her death the suit abated as to her. She was not, therefore, a party when the decree was entered. If the complainant wished to preserve he suit as to her or her representatives, it was his duty to have it revived, and the representatives made parties; without them the court had no authority or jurisdiction to proceed.

It appears in this record that on the 7th of March, 1877, Mrs. Buckner was dead, and on that day an order was entered in the *original suit* wherein her death was suggested, and her daughter, Lily Buckner, was substituted as a party complainant in the cross-bill. (Rec., 392.) On the same day a final decree was entered as to the Spencer tract in pursuance of the special direction of the Supreme court on the second appeal. (Rec., 393.)

It thus appears not only that Mrs. Buckner was dead, but that her daughter had been made a party in the original suit, sixteen months before the final hearing of this case in the court below, yet, Lily Buckner was not made a party to this suit, and on this record she stands as the heir at law of her mother, and vested with the title to the estate in controversy. The decree could not be impeached or set aside without her presence in court. She was a necessary party.

W. C. Goudy,
For Appellees.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 176.

HENRY W. KINGSBURY

vs.

SIMON B. BUCKNER ET AL.

APPEAL FROM NORTHERN DISTRICT OF ILLINOIS.

REJOINDER FOR APPELLEES.

W. C. GOUDY,
For Appellees.

JUDD & DETWEILER, PRINTERS.

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OCTOBER TERM, 1889.

No. 176.

HENRY W. KINGSBURY

vs.

SIMON B. BUCKNER ET AL.

APPEAL FROM NORTHERN DISTRICT OF ILLINOIS.

REJOINDER FOR APPELLEES.

Two reply briefs have been filed, one by Mr. Wilson and the other by Judge Trumbull. Some points therein seem to justify the appellees in making answer to them. Other points have been sufficiently discussed.

I.

Proper Parties Not Before the Court Below to Authorize a Decree for Complainant.

In answer to the last point made in my argument (page 126), both counsel refer to an averment in the bill that the interest of Mrs. Buckner had ceased by a deed from her, joined by her husband, to R. W. Wooley, who had conveyed to Buckner, and claim that this allegation is admitted because it is not denied in the plea or answer.

Reference is made by Mr. Wilson to State of Rhode Island *vs.* State of Massachusetts, 14 Peters, 272, and Goodrich *vs.* Pendleton, 3 John. Ch., 390, as authority. Neither of these cases apply to the case at bar. In the first case there was a plea only, and it was correctly held that the matters in the bill not denied *by the plea* were admitted. There was no answer. In the second case there was a plea supported by an answer. That is not this case. The bill proceeds for relief on two grounds—*first*, fraud in procuring the decree; and, *second*, error on the face of the record. As to the first, so far as the averments of the bill relate to that, there is an answer denying everything; as to the second, there is a plea of estoppel.

But the rule of law is settled in Illinois. This case was commenced in the circuit court of Cook county, where the decrees were rendered, to set them aside. The plea and answer were filed in that court. Afterwards, on complainant's application, the case was removed to the United States court. By the rule of law governing the State court where the answer was filed an allegation not admitted or denied must be proved by the complainant. This was laid down at an early day in De Wolf *vs.* Lang, 2 Gilm., 679, and has always prevailed. ×

Judge Trumbull refers to averments of the bill that Buckner had charge of the property before 1861, when he re-

× Stacey vs Randall 17 Ill 470
Bruchard vs Warner 18 Ill 144
Morgan vs Herrick 21 Ill 500
Kitchell vs Burgwin 21 Ill 43

ceived rents, for which no account had been rendered. These statements were not admitted or denied and not sustained by any proof. The same rule applies.

Judge Trumbull says Buckner had a life estate as tenant by the courtesy, and so was a proper party. Even if he had, that did not dispense with making Mrs. Buckner's daughter a party, who had the fee; but he had no such estate. By the decree of November 13, 1871, he was divested of that title and all interest, in pursuance of the directions of the Supreme Court.

Mr. Wilson volunteers the statement that these deeds are of record and can be produced to prove the truth of the averments. This justifies me in saying that the alleged deed of Mrs. Buckner did not divest her of the control of the property.

II.

The Conclusions of Fact are not Proper for Consideration on this Bill or Appeal.

Mr. Wilson insists, in his reply on the point presented in his original argument, that the deed to Henry W. Kingsbury, May 15, 1861, was made to enable Buckner to enter the Confederate service. I have cited authorities to show that in a case where it is sought to set aside a decree for error appearing on the face of the record the Court will not review the conclusions of the court rendering the decree as to the facts, but only consider questions of law.

Irrespective of such rule, the bill in this case made no complaint of the decision or decree on that point. It was not presented as a ground for relief. No issue was made. The bill specified the alleged errors, and this was not one of them.

A complainant must succeed, if at all, on the case made by his bill.

The bill merely claims that the deed of May 15, 1861, was an absolute conveyance made upon a good consideration, and raises no question as to the right of the grantors to establish it as a trust. (Record, 6, 26.)

III.

Allegation that Beckwith Filed the Original Bill, &c., Without the Knowledge of the Relatives of the Minor.

Mr. Wilson refers to an averment of the bill, on page 12 of the Record, that Judge Beckwith filed the original bill as next friend, acted as guardian *ad litem* in answering the cross-bill, and conducted the proceedings without the consent or knowledge of any of the relatives or friends of the infant until after the entry of the decree. He claims that these statements are not denied, and therefore stand admitted. The conclusive answer is that these averments are a part of the charges of collusion and fraud, and are unequivocally denied by both plea and answer. (Record, 190, 191.)

IV.

The Error Assigned in the Supreme Court Presented Every Question for Decision.

Mr. Wilson properly corrects a statement of mine that cross-errors were assigned. Technically that was not so; but there was a decree dismissing the original bill of Henry W. Kingsbury without prejudice, in which he sought to establish the title in himself to the whole of the property, and dismissing the cross-bill of Mrs. Buckner, in which she sought to establish a trust in an undivided half. From this decree Henry W. Kingsbury appealed, and Mrs. Buckner appealed. One transcript was filed for use in both appeals. The record shows that there were two appeals docketed and

separate judgments of reversal in each. (Record, 355, 356.)

The errors assigned by Henry W. Kingsbury questioned the decree so far as it was against him. He had no occasion to complain of the dismissal of the cross-bill; that was in his favor. The Buckners assigned errors, complaining of the decree so far as it was against them. These different errors brought before the court every question involved.

Both appellants were in court prosecuting the respective appeals, and therefore within the jurisdiction. No joinder in error was necessary by any statute or rule of court. Submission of the case on the errors assigned was all that was required.

V.

The Judgment on the Second Appeal is an Estoppel as to These Alleged Errors.

Judge Trumbull claims that the decision as reported in 70 Illinois, 514, and the judgment then rendered by the Supreme Court (Record, 376) is not a bar, because the decree of August 2, 1872, and the order of appeal therefrom is not in the record, although there is evidence that there was an appeal, in which the opinion was delivered and the judgment overruling all errors assigned, except the one as to the decree of August 2, 1872, which was sustained. He also claims that none of the assignment of errors are as to that decree. He also quotes a sentence from the opinion to the effect that appeals were taken from the decrees subsequent to that of November 13, 1871, for the purpose of showing that such decree was not affirmed on the second appeal. (Reply, 5.)

Mr. Wilson insists there is no estoppel because the court held the decision and judgment on the first appeal was conclusive, and that the decree of November 13, 1871, entered as required by the Supreme Court, was not subject to review on a second appeal, and therefore he says the court declined

to consider the errors as to that decree for want of jurisdiction. It might be deemed a sufficient answer to Mr. Wilson to say that, *à fortiori*, such errors could not be considered by the lower court on a bill filed to set the decree aside.

But the facts as to this point are these: An appeal was not taken from the decree of November 13, 1871, but when the subsequent decrees were entered appeals were taken, and it was claimed that such appeals brought up the whole record, including the decree of November 13, 1871. If Judge Trumbull had continued his quotation from the opinion such a statement would have appeared. Twenty-two errors were assigned, and eight of them were as to the decree of November 13, 1871. The court treated that decree as before it by the appeal, and expressly affirmed that as well as the other decrees entered before August 2, 1872. Errors 14 and 16 were expressly as to the decree of August 2, 1872, and these were sustained and that decree reversed.

VI.

The Demurrer of Beckwith and Mrs. Kingsbury.

Judge Trumbull claims that the demurrer of Judge Beckwith and Mrs. Kingsbury admitted the allegations of the bill as to fraud and collusion, not only for themselves, but also for Mrs. Buckner, the real party, and for Gen. Buckner and Gen. Burnside, who answered and pleaded denying such averments. It is true that the party who demurs admits, but for himself alone.

He says Beckwith was a proper party because he would be liable in damages for his fraud, and Mrs. Kingsbury was a proper party because she had dower in the Spencer tract if the decision was against Henry W. Kingsbury, and otherwise if for him.

The answer is that the question of Beckwith's liability in damages was not involved, and a decision against Henry W.

Kingsbury would not only be no bar, but would furnish him his very ground of action, if the allegations were true. As to Mrs. Kingsbury, the Spencer tract had been allotted to Henry W. Kingsbury, and he was not seeking by this bill to disturb it. It may be added that although the record shows a mortgage to Swan which had been foreclosed was signed by Major Kingsbury, yet it does not show that Mrs. Kingsbury ever signed it, and therefore her dower right could not be affected by the decision.

Neither Judge Beckwith nor Mrs. Kingsbury were proper parties, and no relief was sought against them. The demurrer was properly sustained.

W. C. Goudy,
For Appellees.

EXHIBIT "A," SHEET 1. Filed June 11th, 1884.

Schedule of Creditors of Brown, Bonnell & Company.—Exhibit to Special Master's Report.

No. of claim.	When filed.	Name of petitioning creditor.	Residence of creditor.	Nature of claim.	Amount claimed.	Amount reported by the master.			Order in which creditors shall be paid.	Remarks.
						Principal.	Interest.	Total.		
1	May 9,	Upson, Walton & Co.	Cleveland, O.	Account	$40 32	$40 32	$3 13	$43 45	*Pro rata*	
2	" 10,	Wm. Tod & Co.	Youngstown, O.	"	184 16	184 16	12 71	196 87	Do.	
3	" "	Niagara Refining Co.	Buffalo, N. Y.	"	99 66	99 66	7 60	107 26	Do.	
4	" "	Carbon Limestone Co.	Youngstown, O.	Account and note	1,271 40	850 73 280 17	57 99 21 01	908 72 301 18	1,209 90 "	Note overlooked in original calculation.
5	" "	Moravia Limestone Co.	"	Account	33 63	33 63	2 46	36 09	Do.	
6	" "	Greenville National Bank	Greenville, Pa.	Liable as indorser on Ayer's note	9,705 35	9,710 51	673 98	10,384 09	Do.	
7	" 11,	McVay & Walker	Braddocks, Pa.	Account	27 39	27 39	2 07	29 46	Do.	
8	" "	B. F. Parsons	Johnsonville, O.	Do.	29 50	29 50	2 29	31 79	Do.	
9	" "	Sharon National Bank	Sharon, Pa.		101,575 31	101,381 31	6,976 69	108,358 00	Do.	
10	" "	H. C. Frick Coke Co.	Pittsburgh, Pa.	Account	728 25	728 25	56 43	784 68	Do.	
11	" "	B. F. Goodrich Co.	Akron, O.	Do.	16 81	16 81	1 24	18 05	Do.	
12	" "	Cleveland Mal. Iron Co.	Cleveland, O.	Do.	32 50	32 50	2 40	34 90	Do.	
13	" "	Girard Savings Bank	Girard, O.	Liable as indorser on Ayer's note	5,419 86	5,419 86	390 23	5,810 09	Do.	
14	" "	Otis Iron & Steel Co.	Cleveland, O.	Account	1,341 13	1,341 13	140 81	1,481 94	Do.	
15	" "	Taylor Iron Company	"	Notes	11,958 96	11,958 96	853 07	12,812 03	Do.	
16	" "	Merchants' National Bank	Meadville, Pa.	Do.	32,718 28	32,718 27	2,326 42	35,044 70	Do.	
17	" "	A. D. Truesdell	Warren, O.	Account	11 90	11 90	82	12 72	Do.	
18	" "	Bursh Electric Co.	Cleveland, O.	Do.	475 63	475 63	42 80	518 43	Do.	
19	" 12,	John Carlin & Co.	Pittsburgh, Pa.	Note	571 06	572 46	42 34	614 80	Do.	
20	" "	Robinson, Rea & Co.	"	Account	204 15	204 15	12 75	216 90	Do.	
21	" "	Cameron, Amberg & Co.	Chicago, Ill.	Do.	4 20	4 20	30	4 50	Do.	
22	" "	Westerman, Filer & Co.	Sharon, Pa.	Account and note	1,412 25	1,412 28	94 62	1,506 90	Do.	
23	" "	Pendleton, Brother & Co.	Rochester, Pa.	Account	523 23	523 23	40 37	563 60	Do.	
24	" "	*Monongahela Nat'l Bank*	*Brownsville, Pa.*		*33,005 44*				Do.	A duplicate claim filed and adopted as original. See No. 875.
25	" "	Leadville Coal Co.	Youngstown, O.	Account and notes	11,614 81	11,613 81	763 11	12,376 92	Do.	
26	" "	N. Y., P. & O. R. R. Co.		Account for freight	3,561 23	3,509 06	269 58	3,778 64	Do.	
27	" "	Samuel Osborne & Co.	Boston, Mass.	Account	127 64	127 64	10 14	137 78	Do.	
28	" "	Edward H. Kellogg	New York, N. Y.	Do.	723 35	723 35	58 70	782 05	Do.	
29	" "	Allegheny Coal Co.	Youngstown, O.	Do.	150 20	150 20	12 00	162 20	Do.	
30	" "	Chalmers Spence Co.	New York, N. Y.	Do.	189 51	189 51	15 91	205 42	Do.	
31	" "	Alberta Coal Co.	New Lisbon, O.	Do.	247 80	247 80	18 59	266 39	Do.	
32	" 14,	S. Obermayer & Co.	Cincinnati, O.	Do.	86 58	86 58	7 01	93 59	Do.	
33	" "	A. Garrison & Co.	Pittsburgh, Pa.	Do.	196 92	196 92	16 25	213 17	Do.	
34	" "	William Liggitt	Lowellville, O.	Labor and material	35 60	35 60	2 31	37 91	Do.	
35	" "	Joseph C. Brenneinan	Youngstown, O.	Account	505 38	505 38	37 89	543 27	Do.	Claim ass'g'd to J. D. Boyle & Co., Pitts.
36	" "	First National Bank	Garrettsville, O.	Liable as indorser on Ayer's note	5,761 50	5,761 50	440 74	6,202 24	Do.	
37	" 15,	John B. Vinton	Youngstown, O.	Account	552 90	552 90	41 46	594 36	Do.	
38	" "	Shenango Coal Co.	"		19,057 39	19,057 39	1,296 21	20,353 60	Do.	
39	" "	Short & Foreman	Cleveland, O.	Account	39 03	39 03	2 92	41 95	Do.	
40	" 16,	Woods, Perry & Co.	"	Do.	596 46	596 46	49 39	645 85	Do.	
41	" "	W. H. Rickey	Cincinnati, O.	Do.	21 60	21 60	1 57	23 17	Do.	
42	" "	Sharon Coal Co.	Sharon, Pa.	Do.	297 44	297 44	23 04	320 48	Do.	
43	" "	P. Jacobs & Sons	Youngstown, O.	Do.	4,510 75	4,510 75	338 30	4,849 05	Do.	Withdrawn and cancelled Nov. 12, '85. See letter filed with claim.
44	" "	Erskine & Co.	"	Do.	5,946 88	2,645 71	38	2,711 85	Do.	Total claim and int., $6,404.79; Cr. admitted of $3,758.70. See claim.
45	" "	Lowell Limestone Co.	Lowellville, O.	Do.	2,206 64	2,206 64	156 30	2,362 94	Do.	
46	" 17,	Adams & Westlake M'f'g Co.	Chicago, Ill.	Do.	44 50	44 50	3 61	45 11	Do.	
47	" "	Brier Hill Stone Co.	Brier Hill, O.	Do.	21 90	21 90	1 80	23 70	Do.	
					224,880 94	221,198 63	15,339 75	236,530 43		

EXHIBIT "A," SHEET 2. Filed June 11th, 1884.

Schedule of Creditors of Brown, Bonnell & Company.—Exhibit to Special Master's Report—Continued.

No. of claim.	When filed.	Name of petitioning creditor.	Residence of creditor.	Nature of claim.	Amount claimed.	Amount reported by the master.			Order in which creditors shall be paid.	Remarks.
						Principal.	Interest.	Total.		
					$224,880 94	$221,198 68	$15,331 75	$236,530 43		
48	May 17,	Rossie Iron Works	New York, N. Y.	Note and account	8,433 43	8,433 43	653 62	9,087 05	*Pro rata*	
49	" "	Martin Quigley	Erie, Penna.	Account	3,319 91	3,319 91	266 14	3,586 05	Do.	
50	" "	Joseph H. Davis	Sewickley, Pa.	Do.	20 16	20 16	1 61	21 77	Do.	
51	" "	A. Armstrong	Warren, Ohio	Do.	6 60	6 60	50	7 10	Do.	
52	" "	David Jones	Youngstown, O.	For labor performed	1,020 25	1,020 25	117 32	1,137 57	Do.	
53	" 18,	Second National Bank	"		15,262 26	14,740 89	972 99	15,713 88	Do.	See supplemental report.
54	" "	First National Bank	"	Liable as indorser on 9 notes of Ayers & Sons.	49,754 05	49,754 05	3,154 51	52,908 56	Do.	
55	" "	William Cornelius, Treas.	"		4,551 93				Do.	Paid in full.
56	" "	Park, Brother & Company	Pittsburgh, Pa.	Account	138 96	138 96	10 07	149 03	Do.	
57	" "	Standard Oil Co.	Youngstown, O.	Do.	359 04	352 82	29 99	382 81	Do.	
58	" "	Atwood & McCaffrey	Pittsburgh, Pa.	Do.	8 55	8 55	68	9 23	Do.	
59	" 21,	R. S. Walker	Poland, O.	Indorsers on 2 notes Ayers & S.	9,955 75	9,955 75	663 31	10,619 06	Do.	
60	" "	Edwin Bell & Son	Youngstown, O.	Account	1,137 51	1,137 51	85 31	1,222 82	Do.	
61	" "	Youngstown City Water W'ks	"	Do.	47 52	47 52	3 51	51 03	Do.	
62	" 23,	Foster Coal Co.	"	Note	2,467 87	2,467 87	180 57	2,648 44	Do.	
63	" "	Andrews & Hitchcock	"	Notes and account	20,306 02	20,306 02	1,520 23	21,826 25	Do.	
64	" "	John Cannon	Coaltown, Pa.	Account	187 49	137 49	10 56	148 05	Do.	
65	" "	J. H. Outhwaite & Co.	Cleveland, O.	Do.	940 09	940 09	64 65	1,004 74	Do.	
66	" 24,	Nelson P. Reed & Co.	Pittsburgh, Pa.	Do.	9 60	3 60	37	3 97	Do.	
67	" "	Wilcox & Scaife	"	Repairs on mills	216 27	216 27	16 12	232 39	First lien	Mech. lien claimed to date, Feb. 6, '83.
68	" "	Milliken, Boyd & Co.	Youngstown, O.	Account	213 50	213 50	20 19	233 69	*Pro rata*	
69	" 25,	Electrical Supply Co.	Ansonia, Conn.	Do.	364 15	364 15	28 22	392 37	Do.	
70	" "	United Pipe Lines	Oil City, Pa.	Do.	318 84	318 84	35 55	354 39	"	
71	" "	W. R. Errett	Allegheny City, Pa.	Liable as ind's'rs on Ayer's notes	16,952 46	16,952 46	1,289 64	18,242 10	Do.	Lien claimed by attachment and suit still pending in U. S. cir. ct. W. dis. Pa.
72	" "	Himrod Furnace Co.	Youngstown, O.	Note	9,826 94	9,826 94	741 93	10,568 87	Do.	
73	" "	Lawrence Ore Co.	"	Note	4,238 02	4,238 02	321 70	4,559 72	Do.	
74	" 26,	Geo. D. Wick	Cleveland, O.	Liable as ind's'rs on Ayer's note	14,256 50	14,265 50	976 36	15,232 86	Do.	
75	" "	Chess Stoner	North Hope, Penna.	Account	116 45	116 45	9 01	125 46	Do.	
76	" "	H. L. & E. A. Schwartzenberg	Cleveland, O.	Do.	164 40	164 40	13 15	177 55	Do.	
77	" "	Brooks Oil Co.	"	Do.	44 55	44 55	3 56	48 11	Do.	
78	" "	John S. Williams	Youngstown, O.	For services as gen. m'g'r & money loaned.	17,683 81	17,683 81	2,127 95	19,811 76	Do.	
79	" 28,	Hartley & Marshal	Pittsburgh, Pa.	Account	3,200 29	3,200 29	256 02	3,456 31	Do.	
80	" "	Crocker Brothers	New York, N. Y.	Do.	195 87	195 87	16 36	212 23	Do.	
81	" "	Phillips, Stewart & Co.	Mercer, Pa.	Do.	58 30	58 30	4 52	62 82	Do.	
82	" 29,	Menominee Mining Co.	Milwaukee, Wis.	Do.	2,849 92	2,849 92	171 96	3,021 88	Do.	
83	" "	B. F. Rafferty	Pittsburgh, Pa.	Do.	181 52	181 52	15 73	197 25	Do.	
84	" "	Florence Mining Co.	Milwaukee, Wis.	Contract for iron ore and claims for breach thereof.	69,751 41	58,203 91	3,511 09	61,715 00	Do.	Master's report filed and excepted to, but not acted on.
85	" "	Witch Hazel Mining Co.	Youngstown, O.	Account	1,039 90	1,039 90	72 79	1,112 69	Do.	
86	" "	Park & Westlake	"	Do.	262 74	262 74	21 02	283 76	Do.	
87	" "	First National Bank	Mercer, Pa.	Indorsers on Ayer's notes	10,650 10	10,650 10	716 27	11,366 37	Do.	
88	" "	Mayer & Lowenstein	New York, N. Y.	Account	81 25	81 25	4 00	85 25	Do.	
89	" 30,	McMillan Oil Co.	Cleveland, O.	Do.	379 32	379 32	31 17	410 49	Do.	
90	" "	Commercial National Bank	"	Indorsers on 11 Ayer's notes	60,102 94	60,102 94	3,617 94	63,720 88	Do.	Held as collateral security thirty (30) bonds of $5,000 each, secured by first mortgage on all of defendants' property; validity of lien not yet passed upon.
91	" 31,	American Nail Mach. Co.	Ashtabula, O.	Account	11 52	11 52	86	12 38	Do.	
92	June 1,	Pittsburgh & L. E. R. R. Co.		Account for freight	22,855 99	10,233 51	1,158 59	11,392 10	Do.	Lien claimed by attachment in common pleas courts of Allegheny and Fayette Co's, Penna., but lien disputed and suit still pending. Since filing this report the P. & L. E. R. Co. has filed a written statement admitting a credit on its original claim of $5,479.10, paid June 19, 1884, which will leave the amount due it June 1st, 1884, $5,929.55. See papers filed with petition. (See supplemental report.)
93	" "	Lorenzo Lane	Youngstown, O.	Indorsers on Ayer's notes	5,511 26	5,511 26	415 89	5,927 15	Do.	
94	" 2,	McIntosh, Hemphill & Co.	Pittsburgh, Pa.	Account	385 60	385 60	40 55	426 15	Do.	
					$584,721 75	$551,733 99	$38,705 83	$590,439 82		

EXHIBIT "A," SHEET 3. Filed June 11th, 1884.

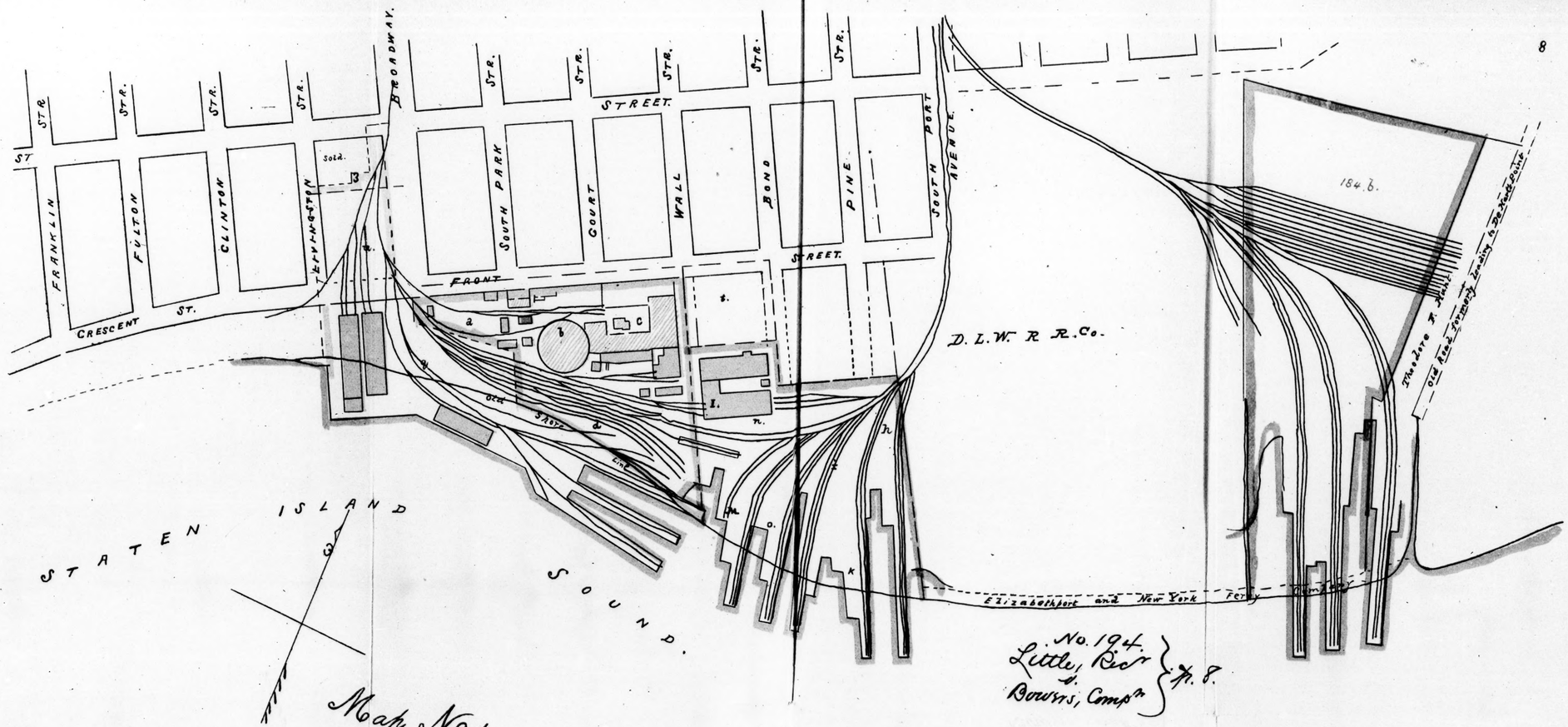
Schedule of Creditors of Brown, Bonnell & Company.—Exhibit to Special Master's Report—Continued.

No. of claim.	When filed.	Name of petitioning creditor.	Residence of creditor.	Nature of claim.	Amount claimed.	Amount reported by the master. Principal.	Interest.	Total.	Order in which creditors shall be paid.	Remarks.
					$584,721 75	$551,733 99	$38,705 83	$590,439 82		
95	June 4,	Dan. P. Eells	Cleveland, O.	For am't paid by him as accommodation ind's'r for def'ts.	37,499 66	37,499 66	2,552 78	40,052 44	*Pro Rata*	Held as collateral security sixteen bonds of $5,000 each, secured by 1st mortgage on all def'ts' property; validity of lien not yet passed upon. Same as opposite claim No. 95, above.
96	" "	Wm. H. Harris	"	For am't paid by him as accommodation ind's'r for def'ts.	37,499 68	37,499 68	2,529 50	40,029 18	"	
97	" "	Henry Wick & Co.	"	Indorsers on Ayer's notes	11,004 31	11,004 31	786 47	11,790 78	"	
98	" "	J. Parke Alexander	Akron, O.	Account	124 40	124 40	9 33	133 73	"	
99	" "	Wick Bros. & Co.	Youngstown, O.	Ind's'r on 4 notes of Ayer & Sons and maker on one note.	27,250 25	27,192 92	2,015 59	29,208 51	"	
100	" 6,	Man'f'rs' & Traders' B'k	Buffalo, N. Y.	Judgment at law	9,973 78	9,973 78	694 85	10,668 63	"	
101	" "	Pratt & Co.	"	Bal. on acc't and as ind's'r on Ayers & Sons' notes.	541 40	454 48	120 13	574 61	"	
102	" 7,	The Pennsylvania Co.		Ind's'rs & makers of notes & f'g'ts.	20,954 65	19,389 33	1,383 64	20,772 97	"	
103	" "	A. & W. Powers	Youngstown, O.	On contract for coal royalties	947 08	947 08	71 61	1,019 69	"	Lien claimed on 200 shares Mahoning Coal Co. stock.
104	" 8,	Hiram Parks	"	Note	5,487 64	5,487 64	406 80	5,894 44	"	
105	" "	C. Kane	Pittsburgh, Pa.	Account	455 48	455 48	38 72	494 20	"	
106	" "	Nat'l B'k of W. Va.	Wheeling, W. Va.	Indorsers on Ayer's notes	5,417 63	5,417 63	410 84	5,828 47	"	
107	" 9,	C. M. Roberts	Pittsburgh, Pa.	Account	228 99	228 99	19 46	248 45	"	
108	" "	Totten & Co.	"	Do.	608 36	608 36	84 97	693 33	"	
109	" "	Dunbar Coke Co.	"	Do.	182 68	182 68	13 28	195 96	"	
110	" 12,	Struthers Iron Co.	Struthers, O.	Notes	21,000 50				Paid in full	Claims as security and that it holds contract for title to Struthers furnace, Struthers, Ohio.
111	" "	Nat'l B'k of Fayette Co.	Uniontown, Pa.	Indorsers on 13 Ayer's notes	72,547 49	72,584 92	4,840 03	77,424 95	*Pro Rata*	See supplemental report filed Jan. 13, '85.
112	" 13,	Port Royal Coal & Coke Co.	Youngstown, O.	Account	109 10	109 10	8 18	117 28	"	
113	" 14,	Citizens' Nat'l Bank	Pittsburgh, Pa.	Ind's'rs on 14 notes, Ayers & S.	68,854 25	68,854 25	4,922 34	73,776 59	Less 3,745.81 = 70,030 78 Less int. from Nov. 7th, '83 127 35 69,903 43	Lien claimed by att. suit in U. S. circuit ct., W. dis. Pa., but lien disputed and suit undetermined. Since filing this report the petitioner admits a cr. of $3,745.81 on their claim. See petition.
114	" "	Second National Bank	Ravenna, O.	" 6 " "	33,495 79	33,495 79	2,211 87	35,707 66		
115	" "	Niagara Refining Co.	Buffalo, N. Y.		99 66					Void. See claim 3.
116	" 15,	Geauga Sav'g & Loan Asso.	Chardon, O.	Liable as ind's'rs on 2 notes of Ayers & Sons.	11,383 38	11,383 38	868 90	12,252 28	"	
117	" "	Ashcroft Man'f'g Co.	New York, N. Y.	Account	5 00	5 00	40	5 40	"	
118	" 16,	Savage Fire Brick Co.	New Cumberland, W. Va.	Do.	148 24	148 24	11 12	159 36	"	
119	" "	D. B. Chambers	Youngstown, O.	For services rendered	898 33	898 33	63 78	962 11	"	
120	" "	Importers' & Traders' Nat. B'k	New York, N. Y.		63,000 00	47,000 00	3,175 22	50,175 22	"	Claim to hold as collateral security two thousand fifty-nine shares, the capital stock of Brown, Bonnell & Co.
121	" 18,	Imperial Coal Co.	Pittsburgh, Pa.	Account and notes	7,182 94	7,182 94	513 70	7,696 64	"	Lien by attachment claimed in suit pending in U. S. cir. ct., W. dis. Pa.
122	" "	W. F. Sanford	Dunbar, Pa.	Money loaned and services rend.	735 35	735 35	55 15	790 50	"	
123	" "	Chas. L. Mackey	Youngstown, O.	Services rendered	33 56	33 56	2 67	36 23	Preferred	Preferred claim to extent of $19.87, for services rendered within 6 mos.
124	" "	James Mackey	"	"	187 62	292 12	19 38	311 50	"	Preferred claim to extent of $104.50, for services rendered.
125	" 19,	Arthur Conway	Erie, Pa.	Account	1,452 75	1,452 75	104 84	1,557 59	*Pro Rata*	
126	" 20,	Phœnix Fire Brick W'ks	Pittsburgh, Pa.	Do.	551 05	551 05	38 57	589 62	"	
127	" 21,	H. Loomis & Co.	"	Com. on sales of iron, etc.	1,205 05	1,205 05	102 43	1,307 48	"	
128	" "	Hubbard Nat'l Bank	Hubbard, O.	Note	11,150 70	11,150 70	857 70	12,008 40	"	
129	" "	Jackson Iron Co.	Cleveland, O.	On contract for ore sold	10,944 26	10,944 26	1,125 43	12,069 69	"	
130	" "	Lake Superior Iron Co.	"	"	12,038 92	12,038 92	1,113 60	13,152 52	"	
131	" "	Henry O. Bonnell & others	Youngstown, O.	On contract for use nail nickers	1,794 80	1,004 76	30 14	1,034 90	"	
132	" 22,	William B. Conway	Warren, O.	For royalty on links and pins	111 00	111 00	7 95	118 95	"	
133	" "	American Manufacturer	Pittsburgh, Pa.	Account	50 00	50 00	3 74	53 74	"	
134	" "	Warren Iddings	Warren, O.	For royalty on links & pins	111 00	111 00	7 95	118 95	"	
135	" "	Republic Iron Co.	Cleveland, O.	Contract	40,285 25	40,285 25	799 00	41,064 25	"	
136	" "	Clarence Walker	Butler, Pa.	Professional services rendered	150 06	150 00	11 25	161 25	"	Assigned to Fayette Brown, receiver, after the filing of this report and by him cancelled. See ass. filed.
137	" 23,	Cartwright, McCurdy & Co.	Youngstown, O.	Account	90 93	90 93	6 97	97 90	"	
138	" "	First National Bank	Bellaire, O.	Notes	5,656 87	5,656 87	342 10	5,998 57	"	
139	" 25,	Goeppinger & Resch	Youngstown, O.	Account	16 13	16 13	1 23	17 36	"	
140	" "	Stambaugh, Thompson & Co.	"	Do.	6 70	6 70	51	7 21	"	
141	" "	Morris Hardware Co.	"	Do.	31 17	31 17	2 38	33 55	"	
					1,108,405 72	1,035,760 06	71,071 57	1,106,830 63		

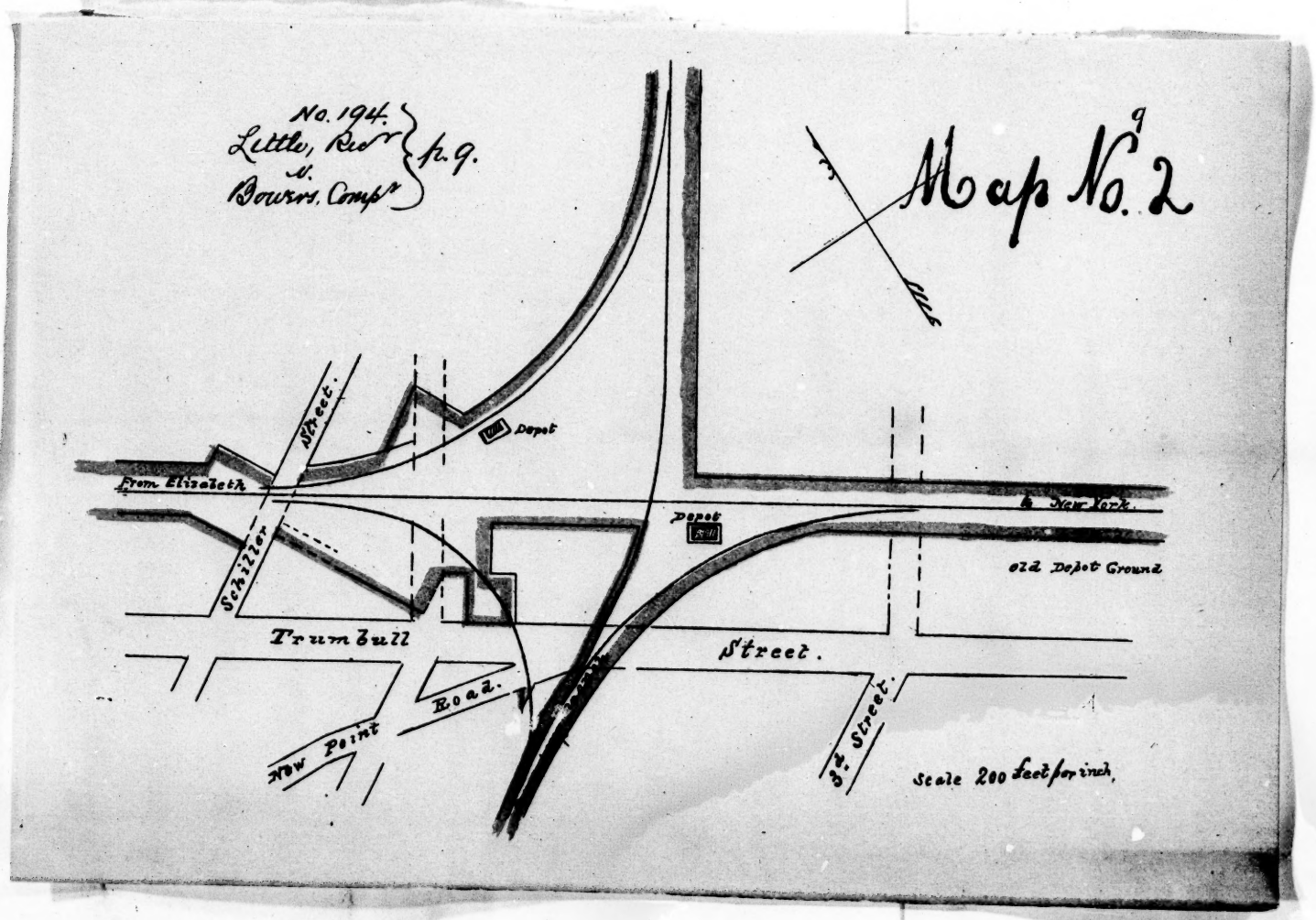
EXHIBIT "A," SHEET 4. Filed June 11th, 1884.

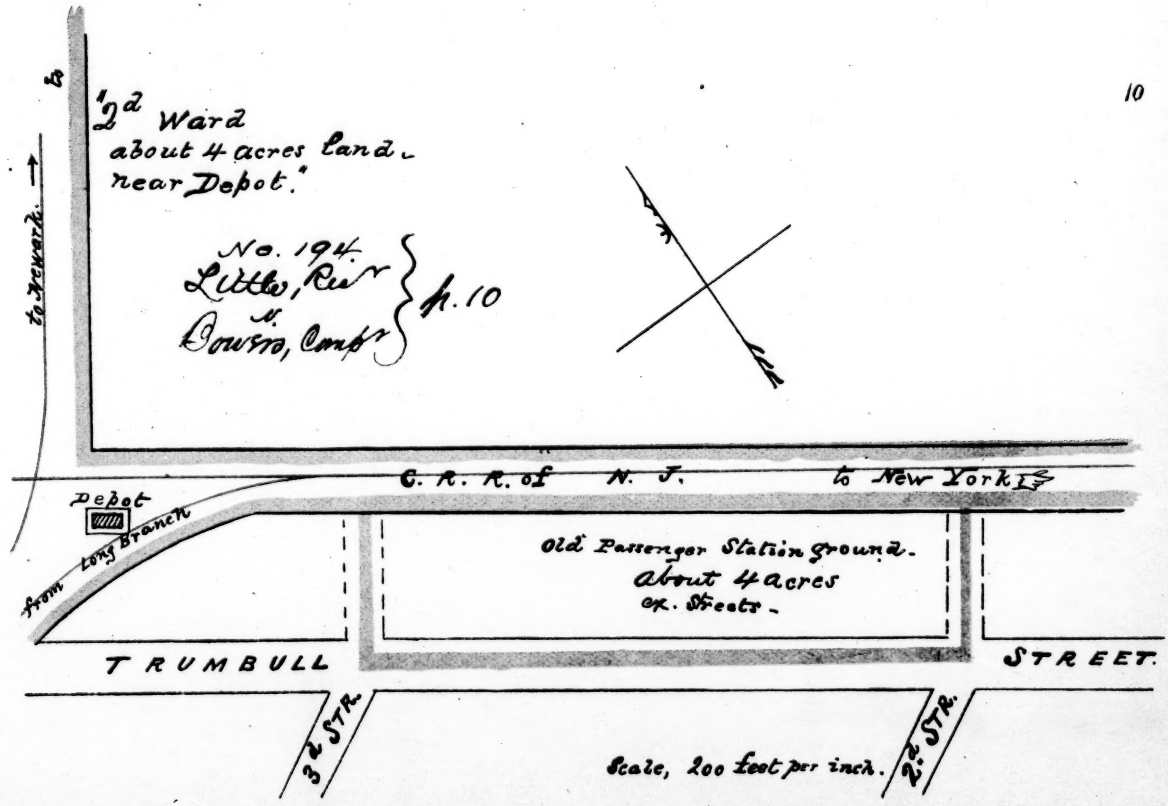
Schedule of Creditors of Brown, Bonnell & Company.—Exhibit to Special Master's Report—Continued.

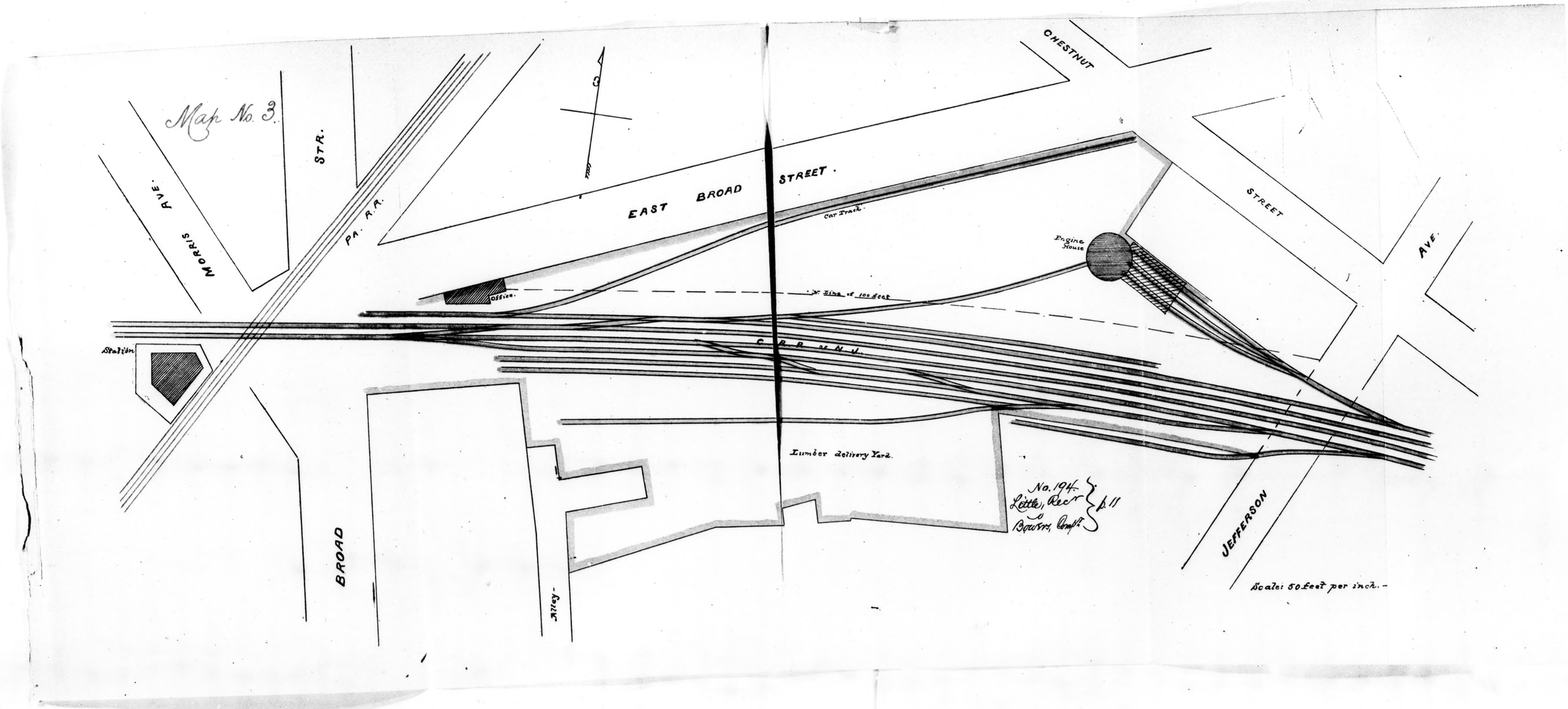
No. of claim.	When filed.	Name of petitioning creditor.	Residence of creditor.	Nature of claim.	Amount claimed.	Amount reported by the master.			Order in which creditors shall be paid.	Remarks.
						Principal.	Interest.	Total.		
					$1,108,405 90	$1,035,760 06	$71,071 57	$1,106,031 63		
142	June 25,	J. H. Bushnell	Youngstown, O.	Account	1 90	1 90	14	2 04	*Pro rata*	
143	" "	A. B. Brownlee & Co.	"	Do.	6 00	6 00	46	6 46	Do.	
144	" "	Nicholas Frich	"	Do.	76 05	76 05	5 79	81 84	Do.	
145	" "	Ellis Planing Mill Co.	"	Do.	37 32	37 32	2 84	40 16	Do.	
146	" "	Wick C. Gans	"	Do.	17 70	17 70	1 35	19 05	Do.	
147	" "	Geo. H. Dingledy	"	Do.	12 59	12 59	98	13 57	Do.	
148	" 26,	Robert Hunter & Co.	"	Do.	50 00	50 00	4 00	54 00	Do.	Lien claimed by attachment in com. pleas court of Allegheny Co., Pa. Suit still pending.
149	" 27,	Pittsburgh Steel Cast. Co.	Pittsburgh, Pa.	Do.	46 84	46 84	3 51	50 35	Do.	
150	" "	Cleveland Roll. Mill Co.	Cleveland, O.	Do.	555 35	555 35	44 35	599 70	Do.	
151	" 29,	Dillinger & Co.	West Bethany, Pa.	Do.	25 73	25 73	3 16	28 89	Do.	
152	" 30,	Laing & Davison	Pittsburgh, Pa.	Do.	1,196 68	1,196 68	87 96	1,284 64	Do.	
153	" "	L. S. & M. S. R. R. Co.		Account for freight	571 87	571 87	42 88	614 75	Do.	
154	July 2,	Wheatland Bessemer Steel Co.	"	Account	180 00	180 00	15 30	195 30	Do.	Holds as collateral security $80,000 of 1st-m'tg'e bonds on property of def'ts. Validity of lien not yet passed upon.
155	" 9,	Chas. A. Otis	Cleveland, O.	Notes	50,000 00	50,000 00	3,208 33	53,208 33	Do.	
156	" 10,	Alexander & Co.	Allegheny City, Pa.	Account	257 80	257 80	20 62	278 42	Do.	
157	" "	Amasa Stone	Cleveland, O.	Notes	37,499 66	37,499 66	2,549 61	40,049 27	Do.	Same remarks as opposite claim 155.
158	" 19,	Brier Hill Iron & Coal Co.	Youngstown, O.		10,500 00	10,492 62	713 86	11,206 48	Do.	
159	" "	Manning, McKeown & Co.	"	Account	27 15	27 15	2 03	29 18	Do.	
160	" 20,	Kirk, Christy & Co.	Warren, O.	Do.	139 94	139 94	13 50	150 44	Do.	
161	" 21,	Jarecki M'f'g Co., Limited	Erie, Pa.	Do.	17 20	17 20	1 29	18 49	Do.	
162	" 23,	Reid Bros.	Dunbar, Pa.	Do.	5,699 71	5,699 71	427 48	6,127 19	Do.	
163	" "	E. W. Powers & Co.	Youngstown, O.	Do.	8 32	8 32	58	8 90	Do.	
164	" 26,	Job Evans	"	Labor performed	279 75	279 75	19 58	299 33	Do.	
165	" 28,	Farmers' & Mech. Nat'l B'k	Mercer, Pa.	Notes	11,017 64	11,017 64	793 94	11,811 58	Do.	
166	" 31,	Farmers' Deposit & Sav. Asso.	Poland, O.	Liable as ind's'r on notes of Ayer's Sons.	5,642 13	5,642 13	320 58	5,962 71	Do.	
167	" "	Shenango Machine Co., L't'd	Sharon, Pa.	Account	20 48	20 48	1 64	22 12	Do.	
168	August 1,	American Ex. Nat'l B'k	New York	Liable as ind's'rs on Ayer's notes	10,620 44	10,605 71	813 32	11,419 03	Do.	
169	" "	Pittsburgh Nat'l B'k of Com.	Pittsburgh, Pa.	" " "	10,932 81	10,932 81	756 61	11,689 42	Do.	
170	" 8,	Iron Cliffs Co.	Negaunee, Mich.	Contract for iron ore	1,236 58	1,275 92	311 78	1,587 70	Do.	Master's report filed, but not disposed of.
171	" "	Third Nat'l Bank	New York, N. Y.	Note	2,949 76	2,949 76	183 27	3,133 03	Do.	
172	" 14,	First Nat'l Bank	Warren, O.	Liable as ind's'rs on Ayer's notes	16,836 97	16,836 97	1,178 67	18,015 64	Do.	
173	Sept. 3,	John Geddes	Liberty, O.	Account	9 75	9 75	1 03	10 78	Do.	
174	" 6,	Sidney Strong	Youngstown, O.	Professional services	152 50	152 50	18 50	171 00	Do.	
175	" "	Monongahela Nat'l Bank	Brownsville, Pa.	Liable as ind's'rs on Ayer's note	33,022 42	33,022 42	2,183 07	35,205 49	Do.	
176	Oct. 20,	Webb, Hart & Co.	Boston, Mass.	Note	393 07	393 07	29 94	423 01	Do.	
177	Feb. 21, '84	Lloyd G. Reed, assignee	Erie, Pa.	Account	1,455 65				Do.	Claim covered by petition No. 125.
					$1,309,903 00	$1,235,819 40	$84,830 52	$1,320,649 92		


FRANKLIN ST.
FULTON ST.
CLINTON ST.
LIVINGSTON ST.
BROADWAY.
SOUTH PARK ST.
COURT ST.
WALL ST.
BOND ST.
PINE ST.
SOUTH PORT AVENUE.
FRONT STREET.
CRESCENT ST.
Sold.
D. L. W. R. R. Co.
Old Shore Line
184 b.
Theodore F. Hunt
Old Road formerly leading to De Hart Point
Elizabethport and New York Ferry Company
STATEN ISLAND SOUND.
No. 194.
Little, Rec^r
v.
Bowers, Comp^n
p. 8.
Scale, 200 feet per inch

Map No. 1.


No. 194.
Little, Rec^r
v.
Bowers, Comp^r
p. 9.
Map No. 2
Depot
From Elizabeth
to New York.
Depot
Old Depot Ground
Schiller Street.
Trumbull
Street.
New Point Road.
3d. Street.
Scale 200 feet per inch.


"2d Ward
about 4 acres land.
near Depot."
No. 194.
Little, Rec'r
N.
Dowers, Comp'r
p. 10
to Newark.
C. R. R. of N. J.
to New York
Depot
from Long Branch
Old Passenger Station ground.
about 4 acres
ex. Streets.
TRUMBULL
STREET.
3d STR.
2d STR.
Scale, 200 feet per inch.


Map No. 3.
MORRIS AVE.
STR.
PA. R.R.
EAST BROAD STREET.
CHESTNUT
STREET
AVE.
Car Track.
Engine House
Office.
W. Line of 100 feet
C. R. R. of N. J.
Station
Lumber delivery Yard.
No. 194.
Little, Recr
Bowers, Compt.
p. 11
BROAD
Alley
JEFFERSON
Scale: 50 feet per inch.